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44

REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1893—JANUARY TERM, 1894.

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VOLUME XXXVIII.

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D. A. CAMPBELL,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

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*Rec. Oct. 1, 1894.*

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OF  
NEBRASKA.  
1893-4.

---

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J. E. BUSH.....Beatrice.

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S. M. CHAPMAN.....Plattsmouth.

### *Third District—*

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W. W. KEYSOR.....Omaha.  
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ROBERT WHEELER .....Osceola.

### *Sixth District—*

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J. J. SULLIVAN .....Columbus.

### *Seventh District—*

W. G. HASTINGS.....Wilber.

### *Eighth District—*

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### *Ninth District—*

J. S. ROBINSON.....Madison.

### *Tenth District—*

F. B. BEALI, .....Alma.

### *Eleventh District—*

A. A. KENDALL .....St. Paul.  
J. R. THOMPSON.....Grand Island.

DISTRICT COURTS OF NEBRASKA. v

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SILAS A. HOLCOMB .....Broken Bow.

*Thirteenth District—*  
WILLIAM NEVILLE.....North Platte.

*Fourteenth District—*  
D. T. WELTY .....Cambridge.

*Fifteenth District—*  
ALFRED BARTOW.....Chadron.  
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## **SUPREME COURT COMMISSIONERS.**

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(Laws 1893, chapter 16, page 150.)

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**SECTION 1.** The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

**SEC. 2.** It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

**SEC. 3.** The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

**SEC. 4.** Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

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The syllabus in each case was prepared by the judge or commissioner writing the opinion.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF NEBRASKA.**

**SEPTEMBER TERM, A. D. 1893.**

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**PRESENT:**

**HON. SAMUEL MAXWELL, CHIEF JUSTICE.**

**HON. T. L. NORVAL,**  
**HON. A. M. POST,** } **JUDGES.**

**HON. ROBERT RYAN,**  
**HON. JOHN M. RAGAN,** } **COMMISSIONERS.**  
**HON. FRANK IRVINE,**

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**DAVID FURBUSH, APPELLEE, V. HIRAM H. BARKER ET**  
**AL., APPELLANTS.**

38 1  
a40 129

**FILED OCTOBER 17, 1893. No. 4542.**

- 1. Equitable Actions: RES ADJUDICATA AS DEFENSE: DEPOSITION IN FORMER ACTION: WITNESSES: EVIDENCE CONCERNING TRANSACTIONS WITH DECEASED PERSONS.** When one of the defenses pleaded in an equitable action was that the matters in controversy had previously been tried and determined adversely to plaintiff in an action brought by him against the decedent, of whom the defendants in the action pending were the heirs and personal representatives, and where the deposition of the decedent, taken in the case already determined, was introduced in evidence in the pending case merely to show the identity of the subject-matter of the two suits, the plaintiff in such suits claiming and testifying that they were not identical, the

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Furbush v. Barker.

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admission in evidence of said deposition, merely for the purpose aforesaid, did not justify the court in allowing in evidence in the pending action the testimony of plaintiff as to personal transactions or conversations between plaintiff and said deceased person as decedent's admissions relative to material matters in the action pending.

2. **Pleading: FINDING FOREIGN TO ISSUES: REVIEW.** Where a finding of fact embodied in a decree is entirely foreign to the issues made by the pleadings, it has no weight in this court, except that if such finding is essential to the decree, such decree must be set aside.
3. **Decree Unsupported by Evidence: REVIEW UPON APPEAL: PRACTICE.** Upon appeal from a decree the findings of fact which are wholly unsustained by the evidence will be set aside, and thereupon such decree directed or entered as the facts proved clearly warrant.

APPEAL from the district court of Sherman county.  
Heard below before HAMER, J.

*Wall & Bradley and Abbott & Caldwell, for appellants.*

*Calkins & Pratt and Nightingale Bros., contra.*

RYAN, C.

On the 3d day of May, 1879, William Benschoter and Eugenie E. Benschoter, his wife, for the expressed consideration of \$700, conveyed by warranty deed to David Furbush certain real estate situated in Loup City, Sherman county, Nebraska, to-wit: all of block 8; all of block 9; all of block 10 except lots 13, 14, 15, and 16; all of blocks 11, 12, 13, and 14 except lots 5, 6, 7, and 8 in the last named block; all of block 15 except lots 4 and 5; all of blocks 30 and 31, and all of block 32 except lots 4, 5, 7, and 8; all of block 33, and all of lots numbered from 44 to 93, inclusive, in block 34. On the same day Eugenie E. Benschoter aforesaid, for the expressed consideration of \$800, conveyed by warranty deed to the said David Furbush all of block 27 except lots 7 and 8. On the same day Will-

iam Benschoter and Eugenie E. Benschoter, his wife, for the expressed consideration of \$500, conveyed by warranty deed to David Furbush the northwest quarter of the northwest quarter of section 18, township 15 north, range 14. These deeds were filed for record in the office of the clerk of said county on the same day and were therein duly recorded. Contemporaneously with the execution of the above deeds David Furbush and wife executed to William Benschoter a mortgage on said lands to secure the payment of the entire consideration recited, one-fourth of which was payable on July 3, 1879, one-fourth on November 3, 1879, and the other half one year from the date of said mortgage. On September 17, 1887, David Furbush commenced this action in the district court of Sherman county, Nebraska, against Hiram H. Barker, Ella M. Barker, Clara Barker, James B. Edgerly, Charles W. Talpey, Hosea B. Edgerly, Charles W. Wingate, Henry R. Parker, Nathaniel Stevens as trustees of the last will and testament of Hiram Barker, deceased, Charles W. Talpey, Alonzo Nute, and John F. Hall as special administrators of the estate of Hiram Barker, deceased. This petition set forth the above conveyances and mortgage, and alleged that on the 2d day of January, 1880, the plaintiff was the owner in fee-simple, and in possession of the lands heretofore described.

The petition alleged that before the purchase of said lands by the plaintiff one Hiram Barker, late of Farmington, New Hampshire, had promised and agreed to and with the plaintiff to loan to the plaintiff sufficient money to pay for said lands when the plaintiff should need the same for that purpose. The petition further alleged that on the 2d of January, 1880, the said Hiram Barker, deceased, by his authorized agent, Noah H. Roberts, with the said William Benschoter, conspiring together to obtain the title to said lands without any just or adequate consideration, and without the consent of plaintiff, demanded of plaintiff that he should deed said lands to said Hiram

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Furbush v. Barker.

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Barker, and represented and promised to plaintiff that if he would deed said lands, that the said Barker would pay said mortgage and hold said lands as security for the amount advanced, giving the plaintiff the right to redeem the same by payment of the sum so advanced, with ten per cent interest, at such further time as the plaintiff might be able to raise said sum of money; that plaintiff, desiring to keep said lands, and believing that he would be able to pay said mortgage before the whole became due, and that said land was worth a much greater sum than the amount required to be paid by said mortgage, refused to make said deed. The petition alleged that at that time Loup City had a population of only about 200, and was suffering commercial and industrial depression, which rendered the residents of said city anxious for public improvements to overcome such depression, and that they were peculiarly disposed to listen to any one who would promise such improvement, and that said William Benschoter, Hiram Barker, and Noah H. Roberts, for himself and as agent for Hiram Barker, conspiring against this plaintiff and intending and contriving to obtain the title to said lands without any just compensation, and without plaintiff's consent, represented to the people of Loup City that the said Hiram Barker was a person of great wealth, who desired to purchase said land to construct a canal and develop the water power of the Loup river, and to build and establish factories and mills and thereby make the village of Loup City an important manufacturing town, and that said Furbush was, by refusing to deed said lands, standing in the way of the future prosperity of said town and its inhabitants and preventing the development of the water power and the establishing of the mills and factories aforesaid, and that said parties, by the aforesaid means, had created a great prejudice against the plaintiff in the minds of the citizens of Loup City, who thereupon, and under the direction and incitement of said Benschoter,

Barker, and Roberts, prepared an agreement to boycott the plaintiff, and did prepare and circulate a writing pledging the signers not to allow the plaintiff or his family to enter their homes or places of business, and not to hold any social or business intercourse with plaintiff, nor to sell or give plaintiff or his family any article of food, clothing, fuel, or other necessities of life, unless he would sell said lands, and that the writing, being so prepared and circulated, was signed by all but six of the citizens of Loup City, whereupon the boycott was established and enforced against this plaintiff; that plaintiff still refusing to make said deed, the said conspirators threatened personal violence and to tar and feather plaintiff, and that plaintiff's wife, being in feeble health by reason of the fear of injury and the hardships undergone under said boycott, became sick and feeble, and that while plaintiff's said wife was so sick and feeble, some of the said conspirators, to plaintiff unknown, attacked plaintiff's house and smashed in the windows; that said Benschoter, Barker, and Roberts, and others in collusion with them, by reason of the means aforesaid did put plaintiff and his family in great fear, and that plaintiff, through force and restraint of said wrongful acts, and not otherwise, did, on the 2d day of January, 1880, execute and deliver to said William Benschoter and Noah H. Roberts, as agent of said Hiram Barker, a quitclaim deed for said property, which was duly filed in the county clerk's office of said Sherman county, Nebraska; that at the time of the signing of said deed the said Benschoter and Roberts represented that the grantee named in said deed was the said Hiram Barker, who it was promised would hold the same as security for the amount necessary to pay said mortgage, but that said Benschoter and Roberts wrongfully and fraudulently inserted in said deed the name of William Benschoter instead of the name of Hiram Barker; that the substitution of the name of said Benschoter for that of Barker was without the knowledge or

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consent of the plaintiff, which plaintiff did not discover until long afterwards; that during the time aforesaid, Noah H. Roberts was the agent of said Hiram Barker and acting under his authority and direction in each of the steps by him taken to acquire the title to said lands; that William Benschoter, about January 3, 1880, executed a certain deed whereby he pretended to convey said lands to said Noah H. Roberts, Hiram Barker, and one Stephen Nutter in equal undivided shares, which deed was duly recorded in the county clerk's office of Sherman county, Nebraska; that on May 31, 1880, said Roberts conveyed his interest in said lands to Hiram Barker, and on the same date the said Stephen Nutter conveyed his pretended interest in said lands to said Barker; that as between said Benschoter, Roberts, and Nutter on the one part, and Hiram Barker on the other, the said first parties never had any real interest in said premises, but held them in trust for said Barker and not otherwise; that the rents and profits of said lands received by Barker equaled and exceeded the amount advanced by the said Barker to pay said mortgage, with ten per cent interest thereon; that said Hiram Barker afterwards ratified the promises of his agent that said deed should stand as security for the amount advanced, and agreed to account for said lands and reconvey them to plaintiff, but that before said arrangements could be consummated, and in the month of January, 1887, the said Hiram Barker died.

The petition then alleged the appointment by will of the trustees hereinbefore named for Hiram Barker, deceased; that pending the probating of the will, Talpey, Nutter, and Hall were appointed special administrators of the estate of Hiram Barker. The petition then described the relationship of each of the Barkers named in the title of the petition to Hiram Barker, deceased, and their consequent interest in the subject-matter of this litigation. The plaintiff in his petition averred that he submitted, under advice of

counsel, that the deed as made to Benschoter was and is void and of no effect, for the reason that plaintiff executed the same under duress, and that the said deed, had it been freely and voluntarily executed, was at most but a mortgage, and that neither plaintiff nor defendant is in possession of the premises aforesaid. The prayer of the petition was that the amount paid by said Barker to redeem said mortgage and for taxes on said land might be ascertained, and that the amount received by Barker for rents and profits on said lands should also be ascertained; and what lands, if any, which had been conveyed by said Barker, deceased, and by Hiram H. Barker and Clara Barker, and the value of the same, might be ascertained; and that the deed executed January 2, 1880, might be declared void and of no effect, and a reconveyance of the property therein described be decreed; and that the defendants be required to pay the plaintiff the amount of the value of any lands sold by Hiram Barker and by Hiram H. and Clara Barker, and of the rents and profits of said lands, less the amount advanced thereon by the said Hiram Barker to redeem and pay said mortgage. The petition closes with a general prayer for equitable relief.

Stephen Nutter, on August 20, 1888, filed a petition in intervention in this case, claiming an undivided one-sixth interest in the lands which are the subject of this controversy. This claim is not controverted by the defendants, and as a determination of the matters in controversy, if in favor of the defendants, would entitle the said Nutter, upon the admissions of his co-defendants, to a one-sixth interest in the property, this branch of the case will receive no further notice.

On the 3d day of September, 1888, the defendants filed an amended answer, in which they alleged that the plaintiff falsely represented himself to be a man of large means and the agent of other men of great wealth—among whom were the said Hiram Barker, deceased, and Stephen Nutter

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and others—and that he was authorized to purchase for Barker and Nutter a large amount of real estate in the village of Loup City and vicinity, and falsely represented that he desired to purchase for himself, and was able to purchase and pay for a large amount of real and other property in the locality aforesaid; that he had but little money with him, but would soon be in possession of ample means, and desired but to secure a temporary credit on his purchase; these representations were made to William Benschoter, J. Wood Smith, — Hartley, and other residents of the village of Loup City; that on the 3d day of May, 1879, the plaintiff contracted with William Benschoter to purchase all the property described in the plaintiff's petition for the sum of \$2,000, which at that time was the full value thereof, and Benschoter, relying on the false representations made as aforesaid, sold to plaintiff the said premises on credit and took his notes therefor; and that at or about the same time J. Woods Smith, relying on said false representations, sold to the plaintiff a stove and other goods; and the said Hartley, also deceived by said false representations, sold to the plaintiff a span of mules on credit; and divers other persons in the village of Loup City, relying on said false representations, sold to plaintiff large quantities of merchandise on credit; that plaintiff made contracts with divers other persons living in and near said village for the purchase of large tracts of real estate, and took bonds from said persons to convey their lands to said plaintiff and others, the said persons so giving bonds to convey relying on the false representations of the plaintiff made as aforesaid, and that said parties were induced to extend time of payment for said premises on like false representations made by the plaintiff.

Defendants further alleged that about August 10, 1879, plaintiff sold and conveyed to George H. Gibson and William T. Gibson a portion of the premises so purchased, for the sum of \$50, and by falsely representing to William

Benschoter that it was necessary for plaintiff to return to his home in Vermont in order to procure the money then due him, and that upon his return he could and would pay all his debts, the said Benschoter was induced to release the mortgage covering a portion of the premises sold to Gibson and Gibson. The defendants alleged that plaintiff did not bring back money with him on his return from Vermont, and did not pay the debts so contracted, or any of them; that this fact became generally known in the month of November, in the village of Loup City, as was also the fact that plaintiff was not a person of means, and that he had no wealth in Vermont, but, on the contrary, was indebted to numerous persons in said state, and was wholly insolvent and unable to pay his debts, and that he was not the agent of Hiram Barker or Stephen Nutter, or any other person, nor authorized to purchase lands for any other person.

The defendants also alleged that in the latter part of November, or the first of December, 1879, a meeting was called in the village of Loup City by persons who had been induced, by the false representations so made, to extend credit to the plaintiff, to which meeting plaintiff was invited to come and explain why he had made such statements, and at said meeting plaintiff was requested to reconvey to William Benschoter all the lands which had been purchased and which then remained unsold, and to reconvey the mules and other property procured on credit by himself by means of said false representations, which demands were refused by the plaintiff. At said meeting it was agreed among the parties present that said plaintiff was not a person entitled to credit, and that said persons did then and there agree among themselves, as they lawfully might do, to refuse and deny to said plaintiff any further credit. The defendants, however, denied that Noah H. Roberts was present at said meeting, and denied that Hiram Barker, deceased, was instrumental in calling the

same; denied that the defendants or Roberts conspired with Benschoter or any other person to have said meeting called or to induce any person to refuse to sell plaintiff goods on credit; denied that it was agreed among the citizens present at said meeting to boycott the plaintiff or refuse to sell him goods and merchandise for cash; denied that the citizens of Loup City did refuse to sell plaintiff goods or merchandise for cash; denied that the citizens of that village conspired to boycott the plaintiff or refuse social intercourse with him or his family, and alleged the fact to be that if any person did so refuse to visit or hold social intercourse with the plaintiff, such refusal was based solely on his character and standing as a man and citizen, and for no other cause whatever; denied that any threat was made against the life of plaintiff, or to tar and feather him, or to do him any bodily injury.

The answer further alleged that if the goods of plaintiff were taken from him, it was under chattel mortgages giving the mortgagee the lawful right to take and dispose of said property, and that such taking, if any there was, was without any suggestion from Noah H. Roberts or other of the defendants, or Hiram Barker. The conveyance by deed of date January 2, 1880, was admitted in the answer, and it was alleged that it was upon full consideration, and only for the purpose of avoiding the necessary litigation incident to a foreclosure of the mortgage. The answer further denied, in detail, each of the averments of plaintiff's petition, and further alleged that if any agreement was ever made binding upon Hiram Barker for the reconveyance of the property, it should not be enforced on account of the lapse of eight years before this action was brought, in which time, by the building of railroads into Loup City, the value of the property had greatly increased. To this amended answer there was a reply, which was in effect a denial of each of the affirmative allegations therein contained.

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It is probably necessary to a full understanding of the history of this case to state that on March 21, 1882, David Furbush filed his petition in the district court of Sherman county, Nebraska, in which he claimed of Hiram Barker the sum of \$5,747, and interest thereon, as compensation for services by Furbush rendered on behalf of Barker in the purchase of lands in Sherman county, Nebraska. There was service by publication. Issue was duly joined, and a judgment was rendered in favor of Barker against Furbush. The testimony in this case would seem to show that the original papers in that action were not accessible at the time of the trial of this one, and, therefore, that evidence *aliunde* was given of the contents of the pleadings and as to the issues upon which that case was tried. It would seem, however, that the sole question there tried was whether or not Furbush was the agent of Barker in the purchases as to which he claimed a commission. It was, however, testified in this trial that the lands involved in this action were not a part of those for the purchase of which plaintiff claimed a commission in the former action, and it was testified by Mr. Furbush and two of his attorneys in this case that the former action had no reference to the lands purchased by Furbush of Benschoter.

In the trial of this action the plaintiff David Furbush testified that he was eighty years old on November 6, 1887; that he came to Loup City about April 20, 1879; that he purchased of William Benschoter the land in controversy in this action about May 21, immediately following the above date, and remained in Sherman county about four months, and then returned to New Hampshire, from whence he had come to Nebraska; that from New Hampshire he returned to Loup City the very last of October, 1879; that when he bought the land of Benschoter he gave him thereon a mortgage to secure payment, and when about to return to New Hampshire that he gave Benschoter another mortgage, which subsequent evidence shows was one of the chattel

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mortgages hereinafter referred to. Plaintiff further testified that he never represented himself as the agent of Hiram Barker until his return from New Hampshire, and that then he represented himself as the agent to order the bonding (that is, as a stipulation made in the trial shows, taking bonds for deeds). Plaintiff testified that he, after his visit to New Hampshire, took bonds upon the lands of David French and others, not including Benschoter; that he received a letter from Hiram Barker saying that Noah H. Roberts would be at Kearney on a Friday or Saturday named; that Roberts came and together with witness looked over the French land where the water was to be taken out of the Middle Loup river to be used for running mills; that Roberts commended the plan to witness, and told witness he had written Mr. Barker to the same effect, and that Roberts said he could bring in that water \$500 cheaper than witness had recommended it to Barker. Roberts promised that as soon as French had proved up, which he had not yet done, he would take the property.

Plaintiff's evidence as to the William Benschoter land was, that about two weeks after Roberts came, Roberts said to plaintiff: "Your title is no good; you did not pay anything down; if you had paid \$500 down, the title would have been good, but now it is good for nothing." Plaintiff testified that in answer to this he said to Roberts that Judge Wall had written Mr. Barker that his title was perfect and requesting Barker to send to plaintiff the \$2,000 that he had promised plaintiff. Roberts made fun of this and lit out, and plaintiff saw him no more. Mr. Furbush then gave an extended history of conversations between himself and Roberts with reference to "bonded lands" as he called them, on which lands the bonds having been taken to Furbush and Barker, Roberts refused to make payments unless he could get the Benschoter land also, and finally that Roberts threatened to take the money back to New Hampshire and not take any lands if his condition was not com-

plied with, but did not go back at the time he threatened to, but remained over another week, and that the people refused to let plaintiff have anything to eat or drink for money, and one night his window was broken, this course being taken, as witness said, with a view to "freezing him out" and compelling him to sell the Benschoter property. To accomplish this result this witness testified that the people of Loup City threatened to tar and feather him and to ride him on a rail and otherwise to injure him, and even to kill him, and that 104 people of Loup City signed a petition (which seems to have been also for a called meeting at the court house) for the purpose of compelling plaintiff to sell the Benschoter land which by reason of its situation was necessary for the construction of the aforesaid canal; that at this meeting, which was largely attended, Benschoter came in and demanded that plaintiff deed him back the land; that at this meeting Judge Wall advised that if Benschoter and Furbush had any trouble that the law should settle it, and that the people should go no further; that the people went home and so did plaintiff, and that that was the last of it. [This meeting was characterized as the "indignation meeting" all through the testimony of such of the witnesses for Furbush as referred to it in their evidence.]

Plaintiff further testified that he arranged to buy a stove of J. Woods Smith and agreed to pay him \$15 per month on it, with the understanding that he could pay \$25 at the end of the month; that when this stove was being delivered at the house of plaintiff, Smith came along and after some conversation between Woods and Benschoter the stove was carried back; that to secure payment for this stove plaintiff had at first given a chattel mortgage on the stove and it had been taken from plaintiff and was being returned to him when Smith ordered it taken away again. Plaintiff testified that Roberts told him that Benschoter had said "If you put that stove up we can never get the deed to the old man's land. We cannot freeze him out if he has a stove."

Plaintiff further said in his testimony that Bill Benschoter had, previous to this, taken away plaintiff's other furniture on a chattel mortgage and that the weather was very cold; witness thought the thermometer indicated 21 degrees; that they left what belonged to plaintiff's wife, to-wit, one feather bed, three husk beds, six pairs of sheets, and carpets which were put on the bed, but as they were too heavy Mrs. Furbush borrowed a feather bed of Mrs. Straw, which was used for a covering for the bed; that Mrs. Furbush remained in the house without fire for about twelve days or two weeks, while plaintiff stayed three weeks; that to keep Mrs. Furbush warm, flat irons were heated at Mr. Gordon's, but that the next morning Mr. Gordon's boy came over crying and said, "If you come in here to heat your irons or to heat your coffee, they will tear father's house down and drive you away from there;" that witness promised not to trouble them further and did not; that after this plaintiff went to Shields', taking a big wool blanket with the coffee pot and flat irons in it so that no one would know what he was carrying. Subsequently, noticing the failing health of his wife, witness said that he took his wife to the house of John Probasci, and while on the way thither that his wife fell down, though the distance was short; that she staid there two days, and then went to live with her nephew Alonzo Straw; that thereupon Mr. Hartley (and witness thought Mr. Benschoter and others) went to Straw, and Hartley told Straw that if he let plaintiff come in there, they would take the stove away and turn her out of doors (he owed ten dollars on the stove he bought) if he gave Mrs. Furbush anything to eat or drink until she signed that deed.

Plaintiff testified further that after his wife went to Straw's to live, plaintiff's wife's son came back and plaintiff lived with him for about twelve days; that Perkins staid with plaintiff because plaintiff was afraid of his life because they had threatened it; that Bill Benschoter

came into Probasci's with a club in one hand and two in the other, a foot and a half long, and said that Barker and plaintiff had bonded land in part of the city, and the grocery man had refused plaintiff anything to eat; that they could get nothing to eat unless plaintiff gave up so that Barker could get that land and pay the money over; that Benschoter challenged plaintiff to fight a duel; that upon plaintiff's refusal to fight a duel Benschoter swung a club over plaintiff's head; that plaintiff had been struck at more than fifty times before, but had never been hit; that plaintiff's temper being wrought up very high by the conduct of Benschoter, plaintiff brought down upon Benschoter's head a seven pound weight, but that Mrs. Probasci grasped plaintiff's arm, or, as plaintiff's expressed opinion was, there would at the time of the trial been no Benschoter; that at this time Benschoter was, as they call it in the east, "three sheets in the wind and one a fluttering;" that Benschoter threatened witness if he did not deed over the land he (Benschoter) would kill plaintiff; that Mr. and Mrs. Straw told plaintiff that "they were going to throw Mrs. Furbush out of doors if the deed was not made."

Plaintiff testified as to the making of the deed to Benschoter; that while Mrs. Furbush was at the house of Mr. Straw, Blackburn (whom extrinsic evidence shows to have been the attorney of Benschoter) went and made some bargain with Mrs. Furbush to sign that deed; that witness did not know what that bargain was, nor what was paid Mrs. Furbush; that John Probasci, a justice of the peace, was over frequently and said to plaintiff that he had better sign the deed, that it would not be worth the paper it was written on; that the Congregational minister advised plaintiff to do it, and plaintiff finally went up and signed it by his advice under protest; that before signing the deed plaintiff had not been permitted to see his wife for eight or nine days; that Taylor refused to sell plaintiff beans,

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though offered cash for them ; that Benschoter procured Taylor to refuse plaintiff food because his furnishing food would prevent Benschoter getting his deed from plaintiff. Plaintiff said in his testimony that when goods were refused him he had seen Roberts at the back part of the store, but that Roberts never said anything. Plaintiff further testified that he agreed with John I'robasci to make the deed to Hiram Barker ; that there was some paper made out, and this deed put in the hands of D. D. Grow to be delivered to plaintiff's wife ; that she said : " Mr. Grow, will you give me what they put in your hands if I sign that deed ? " to which Grow answered : " I will unless they kill me ; " that she signed the deed and plaintiff signed it ; that you can see that her hand trembled, she was sick and should have been in bed ; that plaintiff supposed the deed was made to Hiram Barker ; after a week or so heard that it was in Nightingale's office, and went over there and forbade them recording it ; that Mr. Grow said it was recorded an hour after it was made ; that plaintiff asked Roberts why he had practiced the deception on plaintiff, and Roberts said it was to save \$500 ; that he, Roberts, had offered Benschoter \$5,500, but that he wanted \$6,000, and that if he took the deed in his own name William Benschoter would know that he, Roberts, would want to take all the other land and he would have to have that \$500 ; that plaintiff, when he joined in the deed, supposed it was only a lease or privilege of bringing water over the land ; that he executed it to save the life of his wife and himself.

Plaintiff further testified that they sent a bill of sale for the stove to his wife and set it up that same day, and from thence forward there was peace ; that the usage she had sustained greatly impaired the health of plaintiff's wife and ultimately caused her death. The deed was signed January 2, 1880. When asked what his wife got for signing the deed plaintiff answered : " You ask her or somebody that

knows better than I do. I think there was a report that she got a horse which she gave to Mr. Perkins. I heard she got \$250 and a horse for signing the deed. I never asked her what she got for signing it." The property was worth, in plaintiff's judgment, \$10,000.

On his cross-examination plaintiff said: "I heard that Blackburn drew the deed; I don't think I saw it; the paper was put into Grow's hands and the deed, or whatever it was, laid down and a blotter over it, and then D. D. Grow, in presence of Probasci, justice of the peace, took the acknowledgment. My wife and I did not know what was under the blotter. I protested to Mr. Grow and all that were there against signing the deed. When I protested I said: 'I sign this deed not on my account, but on my wife's account.'"

On being recalled as a witness on rebuttal plaintiff testified that he was never the agent of Barker until the 15th or 20th of October, 1879, and was not authorized to buy land for Barker until that time; that he had been in partnership and company with Barker and had worked with him in New Hampshire.

The paper spoken of as having been delivered contemporaneously with the deed was a lease, the consideration of which was \$50, which was recited as paid up, upon lots 1 and 2, in block 27, in Loup City, for the term intervening between January 2, 1880, and April 1, 1880; also a lease of all the breaking on the northwest quarter of section 18, township 15 north, range 14 west, from January 2 till November 1, 1880, consideration \$10, acknowledged as paid. The lessor was William Benschoter, and the lessee was Martha A. Furbush.

In respect to the evidence given by Mr. Furbush it is proper to observe that upon it alone his right of recovery, if any there was, must be based, and that he was directly contradicted on many points, and but slightly corroborated in any respect by his own witnesses. It is true that his

step-son gave a statement of what he testified transpired at Farmington, New Hampshire, between Hiram Barker and several of his neighbors on the one hand, and David Furbush on the other, but as the subject-matter of that conversation was the lands "bonded" subsequently to October 13, 1879, it is not deemed important in this case.

Upon the final hearing before his honor, Francis G. Hamer, presiding judge of the district court of Sherman county, the following decree was rendered:

"And now on this 7th day of December, 1889, this cause came on to be heard before the court upon the petition, answer, and reply, the petition of intervention of Stephen Nutter, and the answer of plaintiff thereto, whereupon the court finds from the evidence that long prior to the purchase of the land in controversy by the plaintiff from William Benschoter and extending over a long period of years, the deceased Hiram Barker, and the plaintiff David Furbush, have been accustomed to take contracts of various kinds together and were doing business together at or near the town of Farmington, New Hampshire; that in these transactions the said Barker furnished the capital required and the said Furbush represented the business, or performed the labor required, and that the profits of these transactions were divided between them; that in pursuance of their long established business as set forth, the plaintiff came from Farmington, New Hampshire, to Loup City in Sherman county, Nebraska, in quest of joint investments in land and water powers for the benefit of said Hiram Barker and himself; that said plaintiff was to examine and select the lands and report to said Hiram Barker on the advisability of making each proposed purchase and investments, and the said Barker was to furnish the money required for such investment, and the profits from each transaction were to be separately ascertained and divided between said Hiram Barker and plaintiff; that in pursuance of this relation the plaintiff came to Loup City, Ne-

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braska, from Farmington, New Hampshire, and selected for himself and the said Hiram Barker many tracts of land in and about said Loup City aforesaid, including the lands in controversy in this case, and valuable mill site and water power; that said David Furbush, in pursuance of said arrangement, obtained tracts from the said owners of said lands and property, whereby they separately agreed with the said Furbush and Barker to receive from the said Furbush and Barker certain specified sums of money as the purchase price of said lands and property and consideration thereof to convey and transfer the same to said Furbush and Barker; that among the lands so selected and contracted for were the lands in controversy in this case, for which said Furbush received deeds of conveyance as mentioned in the pleadings, and the said Furbush and wife secured the payment of the purchase price thereof by the execution and delivery of their notes and mortgages by and with the understanding and agreement aforesaid that the said sums of money necessary to purchase said land would be furnished by the said Hiram Barker, and the said notes and mortgages taken up and canceled; that said land was purchased by said Furbush on joint account for himself and said Hiram Barker; that the said Furbush, after obtaining the legal title to said land, being the land in controversy in this action, and the possession thereof, did desire to retain the same for his own exclusive use and benefit and not to share the profit of the purchase and sales thereof with the said Barker, and did make known the said desire to the said Barker; that the said Barker then proceeded by his own efforts and the efforts of one Roberts, who acted as his agent, and by the efforts and conduct of many persons in Loup City, who were incited thereto by the said Barker and his agent Roberts, to boycott, coerce, terrify, and force the said Furbush and his wife by duress to release and surrender their possession and title to said land, to-wit:

(Here follows the description of the real property as set forth in the petition.)

“To that end the plaintiff’s only stove was removed from his dwelling house in the winter season of the year that he might be deprived of fire, and the windows of his dwelling house were destroyed and the bed-clothing removed from the house, so that the plaintiff, then of the age of seventy-five (75) years, and his aged and invalid wife, might be compelled to suffer with the cold of winter; that the plaintiff was threatened with personal violence, with being tarred and feathered; that he was denied the privilege of purchasing food; that by duress, against his will, and because of hunger and cold, lack of bed-clothing, lack of shelter, because of physical suffering, and threats of violence, did with his wife surrender, they said, to the said Barker, and to cancel the said purpose thereof the said Furbush was compelled to convey said land to the said William Benschoter, who thereupon, as a part of said system and plan of duress and in pursuance of an arrangement entered into between him and the said Barker through said Barker’s agent, Roberts, did convey the same, directly or indirectly, to the said Barker; and the court further finds that the lands in controversy were purchased by the said David Furbush on joint account for himself and the said Hiram Barker, and to be paid for by money to be furnished by the said Hiram Barker, and that the title thereto has been held by the said Barker in trust for the said David Furbush and himself; that the intervenor Stephen Nutter has no interest whatsoever in the lands in controversy; that the profits derived from the transactions arising from the said purchase and sale of said lands and premises should be equally divided between the said Furbush on the one hand and the defendant on the other. It is ordered that an accounting be had showing the purchase and sale of all the said lands and all expenses and taxes, and that further evidence be taken by George E. Evans, of

Kearney, Nebraska, in the matter of accounting and to establish the present value of the property undisposed of with the view to the rendition of a judgment and decree upon this finding, and the making of such further orders and decrees in the premises as the court shall seem meet and proper, the referee to report the facts and evidence at the next term; to all of which several findings and the orders of the court the defendants and Stephen Nutter severally except; the plaintiff excepts to that part of the court's finding which finds that the said lands were bought on joint account of the plaintiff and Hiram Barker, deceased, and that said defendants have a joint interest in said premises with plaintiff."

Pursuant to the requirements of the above decree, a referee was appointed, who made due report upon the matters as to which his investigation and report were required. He found that the total amount paid out by the deceased Hiram Barker in his lifetime, and the defendants since his death, for the purchase of lands and all expenses, including commission of George Bickford, the agent by whom sales of real property were made, was \$6,253.50, for which amount the defendants were entitled to a credit. The referee found that there had been received of rents and profits of the property in controversy, and insurance paid upon a loss sustained, the sum of \$11,695.25. The referee further found that the deceased, during his lifetime, and the defendants since his death, had sold and conveyed a large part of the lands in controversy. The report of the referee was confirmed on the 16th day of June, 1890, and it was in pursuance thereof adjudged and decreed as follows:

"1. That the plaintiff is the owner in fee-simple of an undivided one-half interest in the unsold described lands and lots, and that the defendants be, and are hereby, ordered and directed to convey to plaintiff, by good and sufficient deed of conveyance, such undivided one-half interest in said lots and lands; and in case of a failure to ex-

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ecute and deliver such conveyance within twenty days from the date of this decree, it is further ordered and decreed that this decree operate as, and have the effect of, such conveyance, and it shall vest in the said David Furbush and in his heirs forever an undivided one-half interest in the above lands and lots.

"2. That the plaintiff have and recover of the defendants the sum of \$2,720.87, that being one-half of the excess received by the deceased and defendants from said lands over and above the amount paid by them in relation thereto, and that the plaintiff has a valid and subsisting lien upon the undivided one-half held by the defendants for said sum with interest thereon at the rate of seven per cent interest per annum from the 5th day of March, 1890."

This language of the decree was followed by a judgment for costs and specific directions as to the sale of the defendants' interest in the property for the satisfaction of said costs. The penal sum of the supersedeas bond was fixed at \$20,444.

Perhaps it is unnecessary to call attention to the obvious variance between the averments of the petition, the statement of facts of the witness Furbush, and the findings of the court. One state of facts which the petition recited was that Furbush, having purchased the lands of Benschoter and given to Benschoter a mortgage to secure the payment of the purchase price, found himself unable so to do, and that Hiram Barker, by his authorized agent, Roberts, with Benschoter, conspiring to obtain the title, demanded that plaintiff should deed the land to Barker, and as an inducement promised that if he would deed the land as requested, Barker would assume the payment of the mortgage, giving the plaintiff the right to redeem upon the payment of the amount with ten per cent interest thereon. There was no evidence to support this averment, neither did the court find that it was sustained.

Another ground upon which the conveyance was sought

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to be avoided in the petition was because of the alleged duress under which the plaintiff and his wife were compelled to convey the lands on January 2, 1880, to William Benschoter, under the representation that it was to Hiram Barker, who thereunder would assume and pay the mortgage as aforesaid. The most critical examination of the testimony adduced by plaintiff fails to disclose that Hiram Barker was in any way connected with any ill usage of or threats toward either plaintiff or his wife. Moreover, there was no testimony given on behalf of Mr. Furbush which would connect Noah H. Roberts with the ill treatment of which the plaintiff complains. The evidence of the plaintiff in that regard was simply, that at some time when he was refused goods of some character Noah H. Roberts was in the back part of the store. Plaintiff does not pretend to say that he was near enough to hear what transpired on that occasion. Roberts himself testified, on the contrary, that he took no part in anything of the kind, and in so far as he was able dissuaded others from any maltreatment of the plaintiff and his wife. The evidence of the plaintiff himself quite clearly discloses that the deprivation of the stove, bed and bedding, and other articles of furniture, by which the plaintiff and his wife were compelled to suffer from the inclement weather, was due wholly to the several chattel mortgages which the plaintiff had made upon the property taken, and which he had been unable to pay. It might be inferred from the testimony of the plaintiff that Benschoter and Hartley made such use of these chattel mortgages as would bring about the reconveyance to Benschoter of the property which he had previously deeded to plaintiff, but neither Noah H. Roberts nor Hiram Barker was a party either to said mortgages, nor did either of them appear to be in any way connected with their foreclosure. The several merchants, as to whose refusal to sell him goods for cash the plaintiff testified, were sworn and each gave other reasons than a desire to oppress plaintiff for the

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refusal to sell him goods. In one case the subject-matter which the plaintiff desired to purchase was beans, and in respect to them the merchant testified that he wanted them for seed; that they were not for sale. In most instances, however, the merchants in interest testified that the reason they refused to sell was that the plaintiff did not tender them the money, and they regarded his credit as bad.

We cannot forbear comment upon the findings of the learned judge. One of the facts which he found as existing was, that Furbush and Hirman Barker had been together doing business back in New Hampshire for a long time, and that Barker furnished the capital and Furbush represented the business and performed the labor required, and that the profits of these transactions were divided between them; that in pursuance of this long established practice plaintiff came from New Hampshire to Loup City in search of joint investments for himself and Barker, and that plaintiff was to examine and select lands and report to Barker the advisability of making the proposed purchase and investment, and Barker was to furnish the money required therefor, the profits were to be separately ascertained and divided between Barker and the plaintiff; and that in pursuance of this arrangement plaintiff came to Loup City and selected and contracted for a large amount of land, including that in controversy, and contracted with the several owners for the conveyance to himself and Barker of the tracts so selected, and agreed with said owners for payment out of funds to be advanced by Barker. The finding was, further, that the tracts of land in dispute were purchased in this way, and that Furbush and his wife secured the payment of the purchase price thereof by the execution and delivery of the notes and mortgages, with the understanding and agreement aforesaid that said sums of money necessary to such purchase of said lands would be furnished by Hirman Barker, and that the notes and mortgage would be taken up and can-

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Furbush v. Barker.

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ceeded, and that said land was purchased by said Furbush on the joint account of himself and the said Barker. It is unnecessary to greatly amplify remarks upon this finding, viewed in the light of the petition or even of the evidence of Mr. Furbush himself. There was no arrangement, either pleaded or sworn to, whereby Barker agreed in any way, or whereby it appeared that Furbush understood that there was an agreement that this purchase of Benschoter was for the joint account of the plaintiff and Barker. His evidence is quite to the contrary. It is that Furbush bought this land in April, 1879; and he directly testified, upon being recalled to the stand, that he was never the agent of Barker for any purpose until after his return to New Hampshire in October, 1879. This finding, therefore, was not only foreign to the issues tendered by the petition, but was wholly unsupported by the evidence.

In respect to the finding that Barker proceeded by his own efforts, and the efforts of Roberts, and by the efforts and conduct of many persons in Loup City, who were incited thereto by said Barker and his agent, Roberts, to boycott and terrify and force said Furbush and wife under duress by deed to surrender their title to said lands, it is proper to remark that Barker was never outside of New Hampshire, so far as the evidence shows; certainly no one testified that he was ever in Loup City. The testimony fails entirely to connect either Barker or his agent with the boycott of which the plaintiff complains. Furthermore, a fair consideration of the testimony of Furbush himself shows that the conveyance of January 2, 1880, was made in pursuance of an agreement entered into between Mrs. Furbush and counsel for William Benschoter. Very awkwardly Mr. Furbush attempts to deny knowledge of the payment to his wife of the sum of \$250, and the giving to her of a stove and horse and lease of property in Loup City, and also of lands broken out on the forty acres by him purchased of Benschoter, as a consideration for the conveyance

executed on January 2, 1880. Moreover, the testimony of this witness is, that the deed he gave was given under protest. When asked how he protested, he said that he told the parties that he made the conveyance not on his own account, but on account of his wife. The conclusion deducible from all the evidence is very clear, however, that his wife received the consideration above named for the execution of the deed to this property, and if, as the protest implied, the plaintiff conveyed on her account, it would seem that, when she had received a valuable consideration for the conveyance, this protest was rather unseasonable. Again, he says that the reason he made the conveyance was that he supposed it was a lease to Hiram Barker, by whom the mortgage was to be paid, and he himself entitled to redeem upon reimbursement to Barker of the principal and interest expended in discharging the mortgage. It will be remembered that the land in dispute was purchased in May, 1879; that Furbush had no authority upon his own evidence to act as the agent of Barker until October of the same year. There is no competent testimony that when Furbush returned to New Hampshire in October, 1879, Barker made any such agreement as is claimed in respect to taking up and holding the mortgage made in May by Furbush to Benschoter. It is true that there was admitted in evidence statements of Furbush as to a conversation of that character had between himself and Barker upon the occasion of his visit in October, 1879. This was a conversation, however, between this plaintiff and a person since deceased, whose representatives are made defendants in this action, and was in respect to a personal transaction had between the plaintiff and said Hiram Barker. It was admitted in evidence apparently because the deposition of Hiram Barker, taken in a case commenced against him in 1882 by Furbush, was introduced in evidence in this case for the purpose of showing what matters were in controversy in the former case. The plaintiff-

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Furbush v. Barker.

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iff himself had sworn, however, that the subject-matter of the second action was entirely different; that the agency in respect of which he claimed compensation was created in October, 1879, and authorized him to procure bonds for deeds for lands which thereafter he might select, and to avoid the claim that the cause of action set up in this case was not adjudicated in the former case, both the plaintiff and two of his attorneys testified to the difference in the subject-matter of the two suits. It seems to us that this was not a sufficient reason for overruling the objection to the testimony offered predicated upon the provision of section 329 of the Code of Civil Procedure. The exception to the admission of the statements of a person having a direct legal interest in the result of a civil action or proceeding, when the adverse party is the representative of a deceased person, to-wit, "unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation," did not authorize the introduction of the testimony of Furbush in this case upon the point now under consideration. There was therefore no competent evidence to establish the existence of an arrangement whereby Hiram Barker undertook to hold this mortgage, as found in the decree of the district court.

This completes a review of the essential facts upon which the decree of the district court is predicated. After a full and careful consideration of all the evidence used in the trial of this cause in the district court, the belief engendered upon the testimony of Furbush is rendered an absolute certainty.

As to the general reputation of Furbush for truth and veracity, a great deal of evidence was introduced upon impeachment. It is unnecessary to weigh this evidence to the detriment of Mr. Furbush, though it may be remarked that where a man has lived in a neighborhood for fifty or sixty years, and a large number of his neighbors will tes-

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Furbush v. Barker.

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tify that his reputation for truth and veracity is bad, it might be safe, in a close case, to reject his evidence. There is, however, no necessity for resorting to such impeachment. There is, aside from the matters already reviewed, an intrinsic improbability in other facts stated by Furbush in his testimony. In New Hampshire for many years he was harassed by trustee processes, and some of his own witnesses testified that in relation to promises to pay his debts he was "rather shaky." From 1870, at least, up to the time of his coming to Nebraska, the records show that he was every year giving chattel mortgages, or real estate mortgages, for the security of his creditors. Finally, it is shown that the real property of which he was possessed was transferred to two grantees in consideration of their assuming the incumbrance upon the property. Mr. Furbush in New Hampshire took small contracts to do stone-work in the building of cellars, and construction of chimneys and dams and other like improvements, but in none did he have large means or much backing. It is inconceivable that, under these circumstances, he could induce the making of a loan to himself for the purchase of 10,000 acres of land, even at the current price in Sherman county, Nebraska, as early as 1879. The correspondence which has been introduced in evidence in no way justifies, or tends to justify, such confidence in him on the part of Barker. Added to all these considerations is the acquiescence in the title of Barker from May, 1880, until the commencement of this suit on the 17th of September, 1887, a period of almost eight years. Under the issues, and upon a full consideration of all the testimony introduced as sustaining the averments of the petition, the conclusion is irresistible that in many respects the findings of the decree are foreign to the pleadings, and that in no material respect does the evidence sustain the conclusions reached on the former trial. No attempt has been made to review this evidence in detail, for it would be impossible, requiring, as it does, five bound volumes to present it in this court.

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Cunningham v. Katz.

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The judgment of the district court is reversed, and a decree will be entered in this court conformably to the prayer of the amended answer of the defendants as to the undivided five-sixths of the land in controversy, and as to the other undivided one-sixth, a like decree will be entered in favor of Stephen Nutter.

DECREE ACCORDINGLY.

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DENNIS CUNNINGHAM ET AL., APPELLEES, V. SAMUEL  
KATZ, APPELLANT, ET AL.

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62 708

FILED OCTOBER 17, 1893. No. 4738.

**Judgment Based on Conflicting Evidence: REVIEW.** As the appeals by both parties present only questions of fact, as to each of which there was evidence sufficient to sustain the findings of the district court, its judgment is affirmed.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*Hall, McCulloch & English*, for appellant.

*Cowin & McHugh*, contra.

RYAN, C.

On June 7, 1887, Samuel Katz entered into a contract in writing with the firm of Ryan & Walsh for the construction by them of four tenement houses upon certain real property owned by Katz in Omaha. This written contract contemplated as a level for these buildings a line twelve feet and nine inches below the level of Dodge street, upon which the erection was to face. The surface, however, was at its highest point seven feet and six inches below the plane

adopted as that upon which the plans required the block of buildings to be erected. Originally this surface had been created by filling up a slough or creek bed from an irregular surface lying many feet below the surface made by filling in earth. As much of the projected superincumbent buildings required a solid foundation, it was necessary to extend the foundation down to the original surface of solid earth. This part of the work was not covered by the plans and specifications with reference to which the written contract was made. It was therefore necessary at the very threshold of the work to provide for the excavations for, and the erection therein of, solid foundation walls, upon which the block of buildings described in the plans and specifications and written contract was to be built. The evidence is not very satisfactory upon this point, but from it we are satisfied that there was made a memorandum in the writing which was entrusted to the architect who drew the plans and specifications. For some inscrutable reason the subsequent history of this memorandum has been shown neither by Mr. Katz nor his agent, the architect. The parol evidence of the members of the firm of Ryan & Walsh is, therefore, entitled to special consideration as to the terms of this memorandum, and was, we have no doubt, sufficient to establish such terms, as well as the fact testified to by them that it was originally attached to the written agreement above referred to, and became a part of the same. This memorandum provided that for the construction of the foundation below the plane above mentioned the brick work necessary should be paid for at the rate of \$16 per thousand. These foundation walls were, of course, made in ditches excavated for the purpose, of which, after the walls had been built, the unoccupied parts were filled with dirt. Upon the completion of the buildings a dispute arose as to the measurements of the foundation walls above referred to, because of a disagreement of the parties as to the depths to which the foundation walls

extended at different parts thereof. This necessitated digging wells, as they were called, at different points down along the foundation walls, that actual measurements might be made, and thus that the depths to which these walls extended could be accurately fixed. As to the results desired, even this did not establish data from which the number of bricks laid in the foundation walls could be computed with any certainty, and the disagreement still existing, this action was begun to enforce a mechanic's lien for the amount which Ryan & Walsh claim is due upon the entire erection by them made. Though the field of contention was thus necessarily very broad, the conflict was really only as to the number of bricks, the laying of which constituted "extras."

The contractors, Ryan & Walsh, introduced evidence showing the result of the measurements of the foundations to have demonstrated that there were laid 331,000 bricks, for which they were entitled to payment at the rate of \$16 per thousand. On behalf of Mr. Katz, the evidence was that there were but 179,000 bricks laid in said foundation walls. There was other conflicting evidence as to whether or not the footings had been correctly estimated and properly considered.

Upon consideration of these several contentions, and the evidence in support of each, the district court made an equitable average that the number of bricks really laid in the foundation walls, and for which Ryan & Walsh were entitled to pay as extras, under the memorandum above referred to, was 225,000. There was sufficient testimony to sustain this finding, and it will not, therefore, be disturbed, either by increasing the number as asked by Ryan & Walsh, or lessening it as demanded by Mr. Katz. There is presented no other question for determination and the judgment of the district court is

**AFFIRMED.**

## JOSEPH P. MANNING V. JAMES P. VIERS.

FILED OCTOBER 17, 1893. No. 5052.

1. **Pleading: CORRECTION OF NAME OF PARTY: DISCRETION OF TRIAL COURT.** It is within the discretion of the trial court, in furtherance of justice, upon such terms as shall be proper, to allow the amendment of any pleading and process by correcting the name of a party thereto.
2. ———: ———: **PREJUDICE.** Where an amendment has been permitted by which the given name of the plaintiff is changed, no prejudice will be presumed from the mere fact of the change. Resulting prejudice, if any there was, must be made affirmatively to appear.

ERROR from the district court of Douglas county.  
Tried below before DOANE, J.

*Andrew Bevins*, for plaintiff in error.

*G. A. Rutherford*, contra.

RYAN, C.

This case was originally commenced in the court of a justice of the peace, wherein it was docketed, and entitled "Joseph C. Viers v. Joseph P. Manning." In the summons the plaintiff was described as Joseph C. Viers. The title of the case in the verdict was given as J. P. Viers, to whom the appeal bond ran as obligee. On appeal the case was docketed in the name of Joseph C. Viers as plaintiff. The petition, however, was filed in the name of James P. Viers, and the answer was entitled "James P. Viers v. Joseph P. Manning." On motion the title of the case was amended so that James P. Viers was the plaintiff named.

The only question of importance in this case is whether or not the district court erred in permitting this amendment of the name of the plaintiff. Section 144 of the Code of Civil Procedure provides that "The court may, either be-

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State, ex rel. Herpolshelmer, v. Lincoln Gas Co.

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fore or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party," etc. This language expressly authorized the court to amend the title of the case in the respect in which it was amended, and, therefore, no error can be predicated on the order of the court in that respect. If any prejudice resulted from the discretion exercised by the court in the allowance of the amendment complained of, such prejudice should have been made to appear in some manner. Without averment or proof we cannot presume its existence. The judgment of the district court is

AFFIRMED.

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STATE OF NEBRASKA, EX REL. HERPOISHEIMER & COMPANY, V. LINCOLN GAS COMPANY.

FILED OCTOBER 17, 1893. No. 6145.

1. **Trial Upon Pleadings.** Where a case is submitted solely upon the pleadings, the party seeking affirmative relief must, by the pleadings alone, show himself entitled to the relief sought. In such case the question is not, upon whom rests the burden of proof; but who, upon the facts established by the pleadings themselves, is entitled to judgment?
2. **Mandamus: APPLICATIONS: WHERE MADE.** An application for a *mandamus* as between private persons or corporations, as to matters involving only private rights and liabilities, should be made, in the first instance, in the district court of the proper county; the accumulation of appeal and error cases in this court rendering it improper for it to exercise jurisdiction in any class of cases wherein it has not exclusive jurisdiction.

MAXWELL, C. J., dissenting. As I understand the point here decided, it is proposed to refuse to hear an application for *mandamus* in any case between private persons. To this I cannot give my assent, as it is liable to work injustice.

38	33
138	238
38	511
38	33
43	840
38	33
259	288
88	83
61	357

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State, ex rel. Herpolsheimer, v. Lincoln Gas Co.

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ORIGINAL application for *mandamus*.

*Field & Holmes*, for relators

*G. M. Lambertson* and *H. J. Whitmore*, *contra*.

RYAN, C.

H. Herpolsheimer & Co., as relators, filed their petition alleging that such relators were a partnership composed of certain individuals named, and that said relators were engaged in mercantile business at a designated place in Lincoln, Nebraska; that the Lincoln Gas Company, defendant, was a corporation engaged in the manufacture and sale of gas for illuminating and heating purposes, and that said gas company had received from the city of Lincoln the right to enter upon and occupy the streets of said city of Lincoln for the purpose of laying gas pipes to conduct gas to different parts of the aforesaid city, which franchise said company had made extensive use of in its business, whereby it became and was under obligations, upon equal and reasonable terms, to furnish gas, make proper connections, and place meters for the relators and all other citizens of said city applying for the same. The relators averred that they had tendered to defendant the customary fee of one dollar for putting in a meter for relators, and demanded that such meter be connected with the pipes of the defendant, and that gas be furnished the relators as relators' necessities should demand. The petition contained other averments which, in the view taken in this case, are not deemed material and are, therefore, omitted, except as a mere reference to a portion of them hereafter becomes necessary. The prayer was for a *mandamus* to compel the respondent to put a meter in the relators' place of business, connect the same properly, and furnish relators gas for illuminating purposes.

The answer of the defendant contained the following averments:

"9. Respondent further shows that a plant for generating electricity sufficient for lighting a single building can be procured, and that in several cases the owners and occupants of buildings in the city of Lincoln have procured the necessary boilers, engines, dynamos, and appliances for generating and distributing electricity, and have been and now are operating the same and lighting their said buildings with electricity and are no longer dependent upon gas as an illuminant, and have ceased to use the same as a means of illuminating their said buildings.

"10. That some of the persons who have thus established private electric lighting plants have desired to maintain a connection between the gas fixtures in their said buildings and the mains and pipes of this respondent, not for the purpose of regularly and continuously using gas to illuminate their said buildings, but only for the purpose of procuring a supply of gas at such times as the private electrical plants of such persons might be disabled or injured, and until repairs could be effected.

"11. Respondent shows that it would not be profitable to, and this respondent could not afford to, maintain gas connections for such purpose and under such circumstances upon the terms upon which gas is ordinarily furnished by respondents to consumers, viz., 'at the usual and customary price for each thousand feet of gas actually consumed, and this respondent has accordingly adopted the following rule to govern and control in such cases, viz.:

"'All concerned: Commencing the 1st of November, 1892, the rule of the Lincoln Gas Company will be to charge twenty-five (\$25) dollars per month for either gas or electric light connections and their maintenance to those who have a lighting plant of their own and who use the lights of the Lincoln Gas Company simply as emergency lights. In such establishments as an isolated lighting

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State, ex rel. Herpolsheimer, v. Lincoln Gas Co.

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plant could be operated with any degree of profit, the service connections of the Lincoln Gas Company are of necessity large and expensive to establish and maintain, and for this reason this rule is adopted.

“‘D. E. THOMPSON, *President.*’

“12. That during the months of September, October, and November, 1892, the relator procured to be placed in his said building all the necessary boilers, engines, dynamos, machinery, apparatus, and appliances for generating and distributing electricity for lighting all the parts of his said building and announced his intention of furnishing his own light, and further declared that he would no longer be dependent upon the respondent for lighting his said building, and that he should no longer use, desire, or require the gas of respondent for illuminating his said building; that this respondent was at said time maintaining connection with said building and its gas mains and pipes and had eight meters in place in said building, and said connection was maintained at great expense to respondent; that on the completion of relator's said private lighting plant, and when the same had been for some time in successful operation, respondent (after duly informing the relator of its intention so to do, and after bringing the rule set forth in the preceding paragraph to relator's attention, and the relator having refused to accept gas connections on the terms fixed in said rule) caused the said connection to be broken and the said meters to be removed.

“13. That the relator has ever since said time, to-wit, on or about November 29, 1892, lighted his said building with electricity, and has conducted his said business during all of said time without the use of gas, and solely by the aid of electric light; that his said private electric plant is still in operation and use and amply sufficient for relator's use and necessities, and that relator neither requires nor desires gas for illuminating his said building or the successful conduct of his said business.

"14. Respondent avers that after the receipt by it of the written demand set out in relator's petition, and on the 17th day of April, 1893, this respondent notified relator in writing that the connection desired by relator would be furnished on the terms mentioned in the rule of said respondent heretofore set out in this answer, and desired relator to inform respondent of his acceptance of the terms established in said rule; that said relator has made no reply to the said communication of this respondent, but shortly thereafter commenced this suit.

"15. Respondent avers that the said rule is just and reasonable, and that it is ready and willing, and has at all times been ready and willing to furnish relator with meters and to make and maintain connections between its mains and service pipes and the gas fixtures and pipes of the relator in said building upon the terms fixed in said rule."

The parties stipulated that a reply might be filed within three days of the date upon which the stipulation itself was filed, but as this otherwise unwarranted pleading for the most part argumentatively asserted that the requirement of payment of \$25 per month was an unreasonable discrimination against the relators, only such part as is necessary to notice will be set out; and that, when reached in the course of this discussion.

The case was submitted upon the pleadings without any evidence. This presents a question of difficulty as to which we have been able to find no adjudication in point. It is this: The petition should, of course, state the tender of performance of all reasonable conditions precedent upon which the gas company may insist before making gas connections. There is pleaded in the answer a rule of the gas company whereby there is required the payment of \$25 per month by proposed customers situated as are the relators. The reply, using its own language, "admits that defendant company claims to have established a rule set forth in the defendant's answer, whereby it should charge these

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State, ex rel. Herpolsheimer, v. Lincoln Gas Co.

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plaintiffs the sum of \$25 per month for the use of its gas meter, but denies that such company has ever made or established any such rule and applied it to the general public or to the other customers of the defendant company similarly situated and having a private electric plant for lighting as have these plaintiffs." This language, as we understand it, admits that the company claims to have established the rule set out in defendant's answer, but asserts that it has never made, established, or enforced such rule as against the general public or other customers situated as are the relators. It is not a denial, but rather an admission of the existence of the rule. Its uniform application and reasonableness are, however, called in question by the above quoted language, and that immediately following it, in which the charges made for supplying the Lindell hotel, having an electric light similar to that of the relators, are instanced as establishing this lack of uniformity and reasonableness as against the relators. The existence of the rule not being challenged, the relators' only avoidance of it is on the grounds that it should not be enforced against the relators, first, because it has not been applied to others, and second, because it is an unreasonable rule. If these propositions were under consideration upon a trial in the light of evidence, it would be proper to inquire upon whom was the burden of proof, and possibly by resort to our own observation, one species of evidence incompetent though it might be, we might say that this charge was unreasonable, or we might say that proof of its reasonableness devolved upon the defendant. Submitted as the case is, upon the pleadings alone, a resort to our own experience or observation to test the reasonableness of this requirement is not permissible. What might be our private judgment upon this question of fact is of no consequence, for we can now only consider the averments, admissions, and denials of the pleadings. Without doubt there should be evidence as to what charges have

Scharman v. Scharman.

been made to others for like service to those sought to be compelled by this action. From these considerations it results that solely upon the pleadings as they stand the relief demanded cannot be granted. There must be evidence, at least, as to the matters above indicated to entitle the relators to a *mandamus* as prayed; and as it is desirable that no mere technical obstacles shall bar the right of relators to whatever relief they may show themselves entitled, this application will not be absolutely denied.

In view of the accumulation of business in this court, however, and of the imperative necessity of devoting all available time and efforts to the disposition of the cases already submitted on error proceedings and appeal, we must insist that all original applications in the nature of that made in this case, involving, as they do, only the private rights and liabilities of private parties *inter sese*, shall be made in the district court of the proper county. It is therefore ordered that this application be dismissed without prejudice to the right of the relators to begin and maintain such proceedings as shall be deemed advisable in another court.

RAGAN, C., concurs.

IRVINE, C.: I concur in the disposition made of this case, upon the ground stated in the second paragraph of the syllabus.

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A. MARGARET SCHARMAN, APPELLEE, V. CONRAD A.  
SCHARMAN ET AL., APPELLANTS.

FILED OCTOBER 17, 1893. No. 5093.

1. **Land Contracts: ASSIGNMENT AS SECURITY: LIEN OF ASSIGNEE.** A contract for lands, absolutely and formally assigned to another in writing, but designed as a security for a debt, is

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39	743
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40	468
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62	65

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Scharman v. Scharman.

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but a mortgage, and when the debt is paid the lien of the assignee will cease. *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692, followed.

2. Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor. *Uhl v. May*, 5 Neb., 157, followed.
3. To sustain an estoppel because of the omission to speak there must be both the specific opportunity and the apparent duty to speak. The party maintaining silence must have known that some one was relying thereon, and was either acting, or about to act, as he would not have done had the truth been told. *Viele v. Judson*, 82 N. Y., 32, approved.

APPEAL from the district court of Lincoln county.  
Heard below before CHURCH, J.

*Fawcett, Churchill & Sturdevant*, for appellants:

Even if there was not a *bona fide* sale from the plaintiff to the defendant Scharman of the lands described in the land contracts in controversy, still the plaintiff, by her conduct in clothing the defendant Scharman with the *indicia* of ownership of the lands in controversy, and in permitting him to hold himself out to the world as the owner of the lands, and thus gaining a credit in the commercial world, and particularly with the defendants Rector & Wilhelmy Company, which he would not otherwise have had, and the defendants Rector & Wilhelmy Company having relied upon the truthfulness of his claim of ownership and given credit on the strength of the same, the plaintiff is now estopped to assert any claim, right, title, or ownership to the lands in controversy as against the defendants Rector & Wilhelmy Company. (*Root v. French*, 13 Wend. [N. Y.], 570; *Saltus v. Everett*, 20 Wend. [N. Y.], 267; *Selser v. Brock*, 3 O. St., 308; *Resor v. Ohio & M. R. R. Co.*, 17 O. St., 140; *Combes v. Chandler*, 33 O. St., 183; *Anderson v. Armstead*, 69 Ill., 452; *Forbes v. McCoy*, 24 Neb., 703; *Blais v. Wait*, 69 N. Y., 113; *Gillespie v. Sawyer*, 15 Neb., 541; *Dinsmore v. Stimbert*, 12 Neb., 437; *Putman v. Sul-*

*livan*, 4 Mass., 45; *Roy v. McPherson*, 11 Neb., 199; *Hansen v. Berthelson*, 19 Neb., 433; *Bartlett v. Cheesbrough*, 23 Neb., 767; *Fisher v. Herron*, 22 Neb., 183; *Herman, Estoppel*, pp. 1063, 1069, 1099, 1100.)

The plaintiff is estopped, by the terms and covenants of her assignment, from alleging or proving that there was no consideration paid for the assignment by her to her son Conrad. (Secs. 50, 53, ch. 73, Comp. Stats.; *Dailey v. Kinsler*, 31 Neb., 340; 1 Perry, Trusts, sec. 162; *Wait v. Day*, 4 Den. [N. Y.], 439; *Blodgett v. Hildreth*, 103 Mass., 486; *Randall v. Phillips*, 3 Mason [U. S.], 388; *Allison v. Kurtz*, 2 Watts [Pa.], 185; *Graves v. Graves*, 29 N. H., 129; *Philbrook v. Delano*, 29 Me., 410; *Groff v. Roher*, 35 Md., 333; *Hogan v. Jaques*, 19 N. J. Eq., 123; *Farington v. Barr*, 36 N. H., 86; *Walker v. Locke*, 5 Cush. [Mass.], 90; *Bragg v. Geddes*, 93 Ill., 39; *McDonald v. Stow*, 109 Ill., 44; *Whiting v. Gould*, 2 Wis., 552\*; *Jackson v. Cleveland*, 15 Mich., 94; *Van Der Volgen v. Yates*, 5 Selden [N. Y.], 219; 2 Herman, Estoppel, sec. 642; 2 Devlin, Deeds, secs. 834, 921; *Van Rensselaer v. Kearney*, 11 How. [U. S.], 297; *Bank of United States v. Housman*, 6 Paige Ch. [N. Y.], 535; *Squire v. Harder*, 1 Paige Ch. [N. Y.], 493; *Smith v. Williams*, 44 Mich., 240.)

*T. Fulton Gantt, contra:*

The assignment was intended as security, and if it were as absolute on its face as a warranty deed, it might be shown by parol that it was intended as security only. (*McHugh v. Smiley*, 17 Neb., 622; *Eiseman v. Gallagher*, 24 Neb., 81; *Thompson v. Thompson*, 30 Neb., 489; *Turner v. McDonald*, 9 Am. St. Rep. [Cal.], 189; *Raynor v. Drew*, 72 Cal., 307; *Helm v. Boyd*, 124 Ill., 370; *Robinsons v. Lincoln Savings Bank*, 85 Tenn., 365; *McMillan & Son v. Jewett*, 85 Ala., 476; *Morris v. Nixon*, 1 How. [U. S.], 126; *Russell v. Southard*, 12 How. [U. S.], 154; *Edrington v. Harper*, 3 J. J. Marshall [Ky.], 355;

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Scharman v. Scharman.

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*Jenkins v. Eldredge*, 3 Story [U. S.], 293; *Taylor v. Luther*, 2 Sumner [U. S.], 228; *Newman v. Edwards*, 22 Neb., 248; *Conway v. Alexander*, 7 Cranch [U. S.], 238; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. [U. S.], 201\*; *Babcock v. Wyman*, 19 How. [U. S.], 299; *Case v. McCabe*, 35 Mich., 100; *Flagg v. Mann*, 2 Sumner [U. S.], 533; *Dunman v. Coleman*, 59 Tex., 199; *Fisk v. Stewart*, 24 Minn., 97; *Anthony v. Anthony*, 23 Ark., 479; *Moore v. Lackey*, 53 Miss., 91; *Carpenter v. Black Hawk Gold Mining Co.*, 65 N. Y., 43; *Jackson v. Parkhurst*, 4 Wend. [N. Y.], 369; *Jolly v. Single*, 16 Wis., 308; *Griffin v. Griffin*, 18 N. J. Eq., 104; *McNamara v. Culver*, 22 Kan., 661; *Davis v. Stonestreet*, 4 Ind., 101.)

One who buys an equitable title takes it subject to all prior equities, is put upon inquiry and takes his chances. An attaching creditor has no greater rights. (*Hibbard v. Weil*, 5 Neb., 45; *Mansfield v. Gregory*, 8 Neb., 433; *Westheimer v. Reed*, 15 Neb., 664; *Drake*, Attachment, 223; *Linnell v. Battey*, 2 Chicago L. J., n. s. [R. I.], 315.)

Defendants made no claims, as to reliances upon the lands, in plaintiff's presence. Plaintiff knew nothing of such claims, had no opportunity to speak, and is not estopped by her silence. (*Bispham*, Prin. of Eq., 352, 355; 1 Greenleaf, Evidence, sec. 202, note 2; *Holdane v. Trustees of the Village of Cold Spring*, 21 N. Y., 474; *Mayenborg v. Haynes*, 50 N. Y., 675.)

Rector & Wilhelmy Company are strangers to the assignment, and cannot take advantage of the statute of frauds as an estoppel. (*Eiseley v. Malchow*, 9 Neb., 180; *McCormick v. Drummett*, 9 Neb., 389; *Rickards v. Cunningham*, 10 Neb., 420; *Kemp v. Small*, 32 Neb., 318; High, Injunctions, sec. 251; *Treadwell v. Payne*, 15 Cal., 496; *Walrath v. Redfield*, 18 N. Y., 457; *Pope v. O'Hara*, 48 N. Y., 446.)

William Neville, also for appellee.

RAGAN, C.

A. Margaret Scharman sued Conrad A. Scharman, Rector & Wilhelmy Company, and D. A. Baker, sheriff of Lincoln county, Nebraska, in the district court of that county, and in her petition alleged that on the 12th day of June, 1889, she was the owner of certain Union Pacific land contracts, calling for three quarter sections of land in Lincoln county, Nebraska; some of the lands represented by these contracts she had purchased from the Union Pacific Railway company direct, and others she had purchased from purchasers from the Union Pacific Railway Company; that on the 12th day of June, 1889, she borrowed of the North Platte National Bank \$550, and gave a note therefor, signed by her husband and her son, Conrad A. Scharman, and that on said date, for the purpose of securing the payment of said note to said bank, she made an absolute formal assignment, in writing, of all of said land contracts to her son, Conrad A. Scharman, and that he deposited said contracts with said bank to secure the payment of said note; that the assignment of said land contracts to her said son was for the purpose only of securing the payment of the note given to said bank, and not for the purpose or with the intent of placing the title or ownership of said lands, or any of them, in her said son, Conrad A. Scharman; and that he agreed, when she repaid him the money borrowed, that he would reassign to her said contracts; that during the year 1889 her son, Conrad A. Scharman, was a member of the copartnership of Stewart & Scharman, a firm doing a hardware business in North Platte, Nebraska; that she had paid all the money borrowed by her and for which she had pledged or assigned said land contracts, and that her son, Conrad A. Scharman, had neglected and refused to reassign to her said contracts; that the defendants Rector & Wilhelmy Company had brought a suit against the copartnership of Stewart & Scharman, and had caused

an attachment to be levied upon all the lands represented by said contracts, claiming said lands were the individual property of said Conrad A. Scharman; that the lands were in fact hers, and hers only; that Conrad A. Scharman had no interest in them, nor any lien upon them; that the proceedings in attachment were a cloud upon the title to the same, and she prayed that Conrad A. Scharman should be decreed to reassign to her said land contracts; that Rector & Wilhelmy Company should be perpetually enjoined from proceeding any further with the attachments levied on said land; that the title to the same might be quieted and confirmed in her.

Conrad A. Scharman did not answer the petition. The sheriff answered, justifying under the attachment. Rector & Wilhelmy Company defended on two grounds:

1. That the assignment of the land contracts by Mrs. Scharman to her son, Conrad A. Scharman, was not intended as security, but made in pursuance of an actual sale of the lands represented by them to Conrad.

2. That Rector & Wilhelmy Company, by reason of the assignment of said land contracts, being in the name of Conrad A. Scharman, were led to believe him the owner of the lands, and, relying on such assignment, they sold the copartnership of which he was a member merchandise on credit, and that Mrs. Scharman was estopped from now claiming the ownership of the lands as against them.

The court found all the issues in favor of Mrs. Scharman, and decreed that Conrad A. Scharman should reassign to her the land contracts; quieted and confirmed the title to the lands in her, and perpetually enjoined their sale under the attachment levied thereon by Rector & Wilhelmy Company, and from this decree the latter parties appeal.

The pleadings, and appellants' argument as well, present two questions, which we notice in their order.

Did Mrs. Scharman assign the land contracts to her son Conrad as security for the payment of money, or in pur-

suance of an absolute sale of the lands to him? The court found that the contracts were assigned by Mrs. Scharman to her son Conrad to secure the payment of \$500 in money loaned by Conrad to his mother June 12, 1889. The evidence supports this finding. Any other finding would be unsupported by the testimony. This \$500 was borrowed from the North Platte National Bank. Conrad and his father gave the bank their note for it, and Conrad deposited with the bank, to secure the payment of the note, these land contracts assigned to him by his mother on that day, June 12, 1889, for that very purpose, and Mrs. Scharman received this money. When this note matured Conrad borrowed the amount of it and interest, \$561, from the First National Bank of North Platte, and with this money paid off the first note, and deposited the land contracts with the First National Bank to secure the \$561 note. Finally, Mrs. Scharman and her husband mortgaged their homestead, and with the money borrowed, paid off the \$561 note. During all this time Mrs. Scharman remained in possession of these lands, on which she had horses and cattle, and other property. She kept up the payments to the Union Pacific Railway Company, the owners of the legal title, and there is no evidence in the record to sustain the contention of appellants that Mrs. Scharman sold or intended to sell these lands to her son on June 12, 1889, or at any other time. It is true the contracts were absolutely and formally assigned to the son, but it was competent to show by parol that they were intended as security in the nature of a mortgage for money loaned. (*McHugh v. Smiley*, 17 Neb., 620; *Eiseman v. Gallagher*, 24 Neb., 79; *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692; *Tower v. Fetz*, 26 Neb., 707; *Thompson v. Thompson*, 30 Neb., 489; *Kemp v. Small*, 32 Neb., 318.)

We come now to the second question in this case, put by the able and ingenious counsel for appellants in their brief as follows: "Even if there was not a *bona fide* sale from the

plaintiff to the defendant Scharman of the lands described in the land contracts in controversy, still the plaintiffs by her conduct in clothing the defendant Scharman with the *indicia* of ownership of the lands in controversy, and in permitting him to hold himself out to the world as the owner of the lands, and thus gaining a credit in the commercial world, and particularly with the defendants Rector & Wilhelmy Company, which he would not otherwise have had, and the defendants Rector & Wilhelmy Company having relied upon the truthfulness of this claim of ownership and given credit upon the strength of the same, the plaintiff is now estopped to assert any claim, right, title, or ownership to the lands in controversy as against the defendants Rector & Wilhelmy Company."

What conduct of Mrs. Scharman is it claimed by appellants estops her? Is it the assignment and delivery to Conrad of the land contracts as security? She did this, but she retained possession of the lands. This was, of itself, notice to all the world of her equities. See *Uhl v. May*, 5 Neb., 157, where this court say: "Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest, whatever it may be, of the possessor." To the same effect see *Filley v. Duncan*, 1 Neb., 134; *Lipp v. Hunt*, 25 Neb., 91; *Smith v. Gibson*, 25 Neb., 511; *Hansen v. Berthelsen*, 19 Neb., 433.

The legal title to the lands was in the Union Pacific Railway Company, and the assigned contracts were not recorded in the office of the register of deeds of Lincoln county. Appellants had then no notice from that quarter that Conrad held the assignment. Appellants argue that they gave Conrad credit by reason of his having in his name the assignment of these land contracts. The evidence, however, of appellants' own witnesses refutes this contention. Neither appellants, nor any of their agents, ever knew that Conrad held the assignment until after he had become indebted to appellants, and had failed in business.

Harberg, appellants' traveling salesman, says he was an intimate friend of Conrad Scharman; that Conrad went into business March 1, 1889, and that appellants began from that time to sell him goods on credit; and that prior to March 1, 1889, he visited the Scharman ranch—Mrs. Scharman's home—in company with Conrad and some others; that at that time "he, Conrad, represented to me that he was interested in these as part owner; that it gave him better credit with the house—it would with me, at least. He represented that he had property. If he had nothing, of course his credit did not amount to anything. He spoke of the lands a number of times; just referred to them, and what they would be worth in the course of time. I visited North Platte about every three weeks; remember the circumstance of Mrs. Scharman's going east." (Mrs. Scharman went east to New Jersey on June 12, 1889, and remained about four months.) He had a conversation with Conrad Scharman after his mother had gone east and Conrad told him: "he told me that his mother had gone east, and had left for good, and that he was the owner of the land; that he paid her one thousand dollars, and the land was now his." He said further, he believed the statements, and communicated them to Rector & Wilhelmy Company, and that the statements gave him better credit; that after that statement he issued him a larger amount of credit than he did before; that "he pointed out to me the land where the section lines ran. He made a motion with his hand; I didn't know how far out it extended." He further testified on cross-examination as follows:

Q. If he represented to you prior to March, 1889, that he owned a part interest out there in these lands, and he, as a matter of fact, did not get any assignment of them from anybody until long after that time, you were deceived by him, were you not?

A. Certainly; yes, sir.

Q. Mrs. Scharman did not tell you that he owned any of these lands?

A. No, sir.

Q. Nor any part of them?

A. No, sir.

Q. Did you make any investigation to see if he owned part of the ranch?

A. No, sir.

Q. You took his word?

A. Yes, sir; I took his word for it.

Q. You had perfect confidence in him, did you?

A. Yes, sir; I took his word for it.

Q. When you went out there to the ranch you went up to the building at the homestead?

A. Yes, sir.

Q. Mrs. Scharman lived there, did she?

A. Yes, sir.

Q. You were in the house where she was, were you not?

A. Yes, sir.

Q. Conrad told you that he was part owner out there?

A. Yes, sir.

Q. And you did not ask her whether that was true or not?

A. No, sir.

Q. Still, you gave him credit on the strength of that?

A. Yes, sir.

Q. You sold him goods on the strength of that?

A. Yes, sir; partly on the strength of that, and partly because—

Q. And partly because he was a good friend of yours, and you thought he was a good business man?

A. Partly that, and other reasons.

Q. And partly because you knew he owned some other property?

A. He had a home here; yes, sir.

Q. Did not you and he ever buy any together?

A. Yes, sir; that was very small, though.

Q. In partnership?

A. Yes, sir.

Q. You were quite friendly, were you not?

A. Yes, sir; we were.

Q. This land that you have testified that you and Con. owned together, what land was that?

A. That was a five-acre tract just west of Grand Island, probably three or four miles from the post-office.

The substance of this evidence is that Conrad Scharman took his friend Harberg out to his, Conrad's, mother's home. Conrad, on the way, says: "I am part owner here." Mrs. Scharman was in possession. The legal title was in the Union Pacific Railway Company. This was some months before Mrs. Scharman assigned the contracts to Scharman. Mrs. Scharman was not present when Conrad pointed out to Harberg the land of which he claimed he was part owner. No inquiries were made of Mrs. Scharman by Harberg as to Conrad's interest in these lands.

It appears, then, that appellants credited Conrad, relying on the latter's claim of part ownership of his mother's lands. She, however, said nothing to appellants on the subject. She did nothing from which appellants might infer that Conrad's story was true. She kept silent when Conrad made his claim, because she did not hear it made. The fact that Conrad while his mother was east, during the months of June, July, August, and September, 1889, claimed ownership of all the lands, did not change Mrs. Scharman's relation to appellants. At no part of this time was Conrad in possession of the lands. Mrs. Scharman did not know that Conrad was asserting such a claim, nor did she learn, after her return, that he had done so. She knew he was in business, but did not know anything about his financial condition, nor did she know appellants were crediting him, or the firm of which he was a member. Her silence did not operate as a fraud upon, nor did it mislead, appellants. She did not have the opportunity to speak, and

being ignorant of the claims of her son, it was not her duty to speak. While she was silent, she did not know that appellants were relying upon her silence, nor that they were relying upon the claims of ownership asserted by her son; nor did she know that they were giving him credit, which they would not have given him had they known the truth. Mrs. Scharman is neither estopped to claim these lands, so far as the evidence shows, either from her silence, or from any act of hers. During her absence in the east, the contracts, though duly and formally assigned to Conrad, were not in his possession or under his control, but were in the bank as security only for the money on which Mrs. Scharman was traveling. Appellants made no inquiries about the assignment for the very good reason that they did not know of its existence. If appellants extended credit to Conrad after June, 1889, relying on his ownership of these lands, they did it on the strength of the statements made to Harberg by Conrad prior to March, 1889. How, then, can it be said that the evidence in this record shows that Mrs. Scharman clothed Conrad with the apparent ownership of her lands, and held him out to the commercial world as owner, and that he thereby obtained credit?

Counsel for appellants cite Herman on Estoppel, page 1099, where it is said: "In order to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person without his assent, the owner must have clothed the person assuming to dispose of the property with the apparent title to, or authority to, dispose of it. The person alleging the estoppel must have acted, and parted with value, upon the faith of such apparent ownership, or authority, so that he will be the loser, if the appearances to which he trusted are not real." But appellants' case is not within the rule here laid down. There is no evidence in this case that appellants gave Conrad Scharman credit upon the faith of his

apparent ownership of his mother's lands. When appellants gave Conrad credit he was not in possession of any part of these lands. He did not have the legal title, or a deed to any of them, and appellants did not know he held the assignment of the contracts.

Counsel also cite *Anderson v. Armstead*, 69 Ill., 452, where it is said: "The law is familiar, that where the owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent parties are thus led into dealing with such apparent owner or person having the apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power he caused or allowed to appear to be vested in the party upon the faith of whose title or power they dealt." We approve of the doctrine of that case; but after repeated searches of the record we have been unable to find any evidence that Mrs. Scharman held out her son to appellants as the owner of her lands, or allowed him to appear to appellants as owner of, or having any control or power of disposition over, her lands; and we are unable to find any evidence that appellants in giving the son credit, did so relying on any apparent title, control, or ownership of these lands by him.

Appellants also cite *Hansen v. Berthelsen*, 19 Neb., 433, but that case is not in point here. In that case Hansen made to Berthelsen, without consideration, an absolute warranty deed of his farm, and himself placed the deed on record. While Berthelsen held this title she exercised acts of ownership over the land. She conveyed a part of it to a school district and accepted from the school district a deed for another part of it. Both these deeds were recorded. Love, in good faith, for a valuable consideration,

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 Brown v. Dunn.
 

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and relying on Berthelsen's title as disclosed by the records, purchased this land. This court held that Love was entitled to a lien on the land for the amount he paid for it, the court saying: "The rule in equity is that where one of two innocent parties must suffer by the wrong of a third, he, who, by his negligence or undue confidence, has been the means by which the other has been deceived, must bear the loss." Rector & Wilhelmy Company do not come within this rule. They did not innocently give credit to Conrad A. Scharman and they were not induced to give him credit by any negligence of Mrs. Scharman, nor by any undue confidence which she placed in Conrad. The decree of the district court is right and the same is in all things

AFFIRMED.

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38	52
43	617
38	52
44	21
44	632

### W. J. BROWN V. FRANK L. DUNN.

FILED OCTOBER 17, 1893. No. 4865.

**Review: BRIEFS: PRACTICE.** Where no briefs are filed by either party in a case brought here on error, this court will examine the pleadings and evidence, and if they support the judgment rendered, it will be affirmed. To obtain a review of specific errors they must be pointed out in the brief of the party complaining. *Phoenix Ins. Co. v. Reams*, 37 Neb., 423, followed.

**ERROR** from the district court of Lancaster county.  
Tried below before FIELD, J.

*Harwood, Ames & Kelly*, for plaintiff in error.

*Adams & Scott*, contra.

RAGAN, C.

This is an action of forcible detainer brought by Frank L. Dunn against W. J. Brown. The district court of Lan-

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 Langley v. Ashe.
 

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caster county, after a trial to a jury and a finding by them that the defendant was guilty, rendered judgment of restitution against Brown and he brings the case here on error.

No briefs have been filed by either party. The judgment of the district court is supported by both the pleadings and the evidence. The case appears to have been brought here simply for delay. We will not examine errors alleged in a petition in error unless such errors are specifically pointed out and relied upon in the briefs filed in the case, under the rules of this court. (*Phoenix Ins. Co. v. Reams*, 37 Neb., 423.) The judgment of the district court is

AFFIRMED.

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JAMES LANGLEY V. BERNARD ASHE ET AL.

FILED OCTOBER 17, 1893. No. 4804.

38	53
42	904
38	53
52	172
53	55
54	437
55	15

**Injunction to Prevent Execution of Judgment: PLEADING.**

A petition in equity to enjoin the enforcement of a judgment of a justice of the peace, which does not aver facts from which it appears (1) that the plaintiff has a meritorious defense to the cause of action on which the judgment is based, and (2) that his failure to interpose such defense in the justice court, and to avail himself of an appeal or proceeding in error, was not due to any neglect or default on his part, does not state a cause of action.

ERROR from the district court of Colfax county. Tried below before POST, J.

*J. A. Grimison*, for plaintiff in error.

*George H. Thomas, contra*, cited: 1 High, Injunctions [2d ed.], secs. 125, 126, and cases cited; 7 Lawson, Rights, Rem. & Pr., 3702, and cases cited; *Scotfield v. State National Bank of Lincoln*, 9 Neb., 316; *Young v. Morgan*, 9 Neb., 169.

## RAGAN, C.

Bernard Ashe sued Charles Cooper and James Langley before a justice of the peace in Colfax county, on a promissory note. The summons was made returnable January 23, 1889, and was duly served. On January 21 Ashe and Cooper appeared before the justice and he, by their consent, continued the case until March 1, 1889. Langley made no appearance whatever in the case, and had no knowledge of this continuance. On March 1, 1889, the justice rendered judgment against Cooper and Langley on said note. April 18, 1889, an execution was issued and placed in the hands of the sheriff, who levied upon a span of horses belonging to Langley, to satisfy the judgment. Langley then brought this suit in the district court against Ashe, the judgment creditor, Bohman, the justice of the peace, and Kuderna, the sheriff, alleging the facts above stated; that said judgment of said justice was null and void as against him, Langley; and that he had a good defense to said action before said justice of the peace. To this petition the defendant in error filed a general demurrer, which was sustained by the court, and the suit dismissed. Langley excepted, and brings the case here on error.

The only question in the case is, does the petition state sufficient facts to constitute a cause of action? The contention of the plaintiff in error is, that as the summons was returnable January 23, 1889, the order of the justice of the peace, on January 21, 1889, adjourning the cause to a future date was a nullity; that the justice of the peace had no jurisdiction at that time to make any order in the case; and that, therefore, the judgment rendered on March 1, 1889 is void. The summons was in all respects in due form of law; was duly served on Langley, and notified him to appear before the justice of the peace on January 23; and if he failed to do so, that judgment would be rendered against him for \$——. He failed to appear then or at any other time.

Did the adjournment of the case, on the request of Ashe and Cooper, to March 1, render the judgment against Langley void? We think not. The justice had jurisdiction of the subject-matter and of Langley on January 23. He did not lose it by failing to enter his default and render judgment against him on that day. His continuance of the case until March 1 was good against Ashe and Cooper, and was, at most, an error of law, voidable only as against Langley. Had Langley appeared on the 23d and demanded a hearing, he was entitled to it; but he did not appear, and the fact that the justice postponed the writing up, or entry, of the judgment until the date to which the cause was set for trial against the other parties to the suit, did not divest the justice of his jurisdiction, either of the subject-matter or of Langley, nor render the judgment absolutely void. The justice should have defaulted Langley on January 23, and rendered judgment against him then; but his failure to do so, at the most, rendered his acts voidable. Langley had a plain and adequate remedy at law for the review and reversal, if erroneous, of this judgment, both by appeal and proceeding in error to the district court; and, until he had exhausted his legal remedies, or, without his fault been deprived of them, he cannot be heard in a court of equity. So far as the record shows, he made no effort to defend himself before the justice. He took no steps to review in law courts the errors alleged. In other words, he has slighted the tribunals and remedies provided by law for him, and now says to allow the judgment to be enforced would be contrary to equity and good conscience. Let us see what he says about the defense he has to the note sued before the justice: "The plaintiff further alleges that he had a good and lawful defense in said action before said justice of the peace in this, to-wit: That he would then have alleged, and does now allege, that he did not sign the promissory note sued upon in said action." This will not do. The question is not

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what he would have alleged before the justice of the peace, but what were the facts. This averment would not entitle him to equitable relief from the judgment had it been rendered against him without any service upon him whatever. (*Janes v. Howell*, 37 Neb., 320.) If he did not sign this note, why did he not appear before the justice on January 23, and say so? If he was prevented from making his defense, if he had one, by accident, surprise, mistake, or fraud, his petition should so state. (*Scofield v. State National Bank*, 9 Neb., 316.) The facts stated in the petition do not constitute a cause of action. The judgment of the district court is

AFFIRMED.

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STATE OF NEBRASKA, EX REL. SIOUX COUNTY, V. JOHN  
S. TUCKER, ASSESSOR, ET AL.

FILED OCTOBER 17, 1893. No. 4781.

1. **Taxation: IMPROVEMENTS ON LAND** held under the pre-emption, homestead, and timber culture laws of the United States, on which final proof has not been made, are subject to taxation against the persons owning such improvements.
2. ———: **SCHOOL LANDS: THE LEASEHOLD** interest of a tenant of school lands belonging to the state is subject to taxation.
3. ———: ———: **IMPROVEMENTS: PURCHASERS.** School lands sold by the state, but to which the equitable title of the purchaser has not been completed by full payment of the purchase money, are subject to taxation to the extent of the purchaser's interest therein, such interest to be determined by the amount paid and invested in improvements on such lands.

ERROR from the district court of Sioux county. Tried below before KINKAID, J.

*Hugh T. Conley*, for plaintiff in error:

Improvements owned by claimants on public lands held

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by virtue of filings made under the pre-emption, homestead, and timber culture laws of the United States are property subject to taxation. (*McWilliams v. Bridges*, 7 Neb., 423; *Brooks v. Hiatt*, 13 Neb., 503; *Carkins v. Anderson*, 21 Neb., 364; *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb., 646.)

Improvements owned by individuals, companies, and corporations on the school lands of the state of Nebraska, while the title to said lands remains in the state, are property. (Secs. 1, 3, ch. 77, Comp. Stats., 1889.)

All property is taxable unless specifically exempted from taxation by law. (*Turner v. Althaus*, 6 Neb., 75; *Crawford v. Burrell Township*, 53 Pa. St., 219; *Bellinger v. White*, 5 Neb., 401; *Miller v. Hurford*, 13 Neb., 24; *Finch v. York County*, 19 Neb., 57; *Morrill v. Taylor*, 6 Neb., 242; *Wood v. Helmer*, 10 Neb., 75; *Roe v. St. John*, 7 Neb., 141.)

No counsel for defendants.

IRVINE, C.

This action was begun in the district court for Sioux county, for the purpose of requiring the respondents, who were the assessors of the different precincts of that county, to include in their assessment all improvements on land held by individuals under the pre-emption, homestead, and timber culture laws of the United States on which final proof had not been made, and also all other improvements on government land within their precincts; and also to include in their assessment the interests of lessees and purchasers of school lands. The case was submitted by stipulation upon the petition. The district court refused the writ, and the relator seeks to reverse the judgment.

Two questions are involved: First—Are improvements upon government lands, upon which final proof has not been made, subject to taxation? Second—Are the interests of purchasers and lessees of school lands subject to taxation?

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State, ex rel. Sioux County, v. Tucker.

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1. By section 4 of the enabling act the federal government laid upon the state the obligation that no taxes should be imposed "on lands or property therein belonging to or which may hereafter be purchased by the United States." The object of this provision was to protect the federal government itself from the imposition of such taxes, and not to discharge government lands from taxation after they should cease to belong to the government. It is only the interest of the government which, by the enabling act, is exempt from taxation, and there can be no doubt that the state has power to subject improvements of others upon such lands to taxation. (*People v. Shearer*, 30 Cal., 645.) The question is, has the state exercised that power?

The constitution, article 9, section 1, provides that "the legislature shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct." Here we have the policy of our revenue laws declared by a command to the legislature to so enact that every person shall pay a tax in proportion to the value of his property. Section 2 provides that the property of the state, counties, and municipal corporations shall be exempt from taxation, and that property used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted. It also provides for deduction in the valuation of lands incumbered by public easements, of the depreciation caused by such easements, and the legislature is given power to exempt the increased value of land by live fences, fruit and forest trees. The general direction in section 1 for the payment of taxes in proportion to the value of all property, together with the expressed power of exempting certain property, found in section 2, implies very clearly an inhibition against the exemption of any property not so specified.

Chapter 38, Compiled Statutes, makes all contracts, promises, assumpsits, or undertakings in good faith, and without fraud, collusion, or circumvention, for the sale, purchase, or payment of improvements made on lands owned by the government of the United States, valid in law and equity and the subject of action. The validity and force of this statute have been often declared by this court. As said by the present chief justice in *Brooks v. Hiatt*, 13 Neb., 503: "Improvements on the public lands are property and a sufficient consideration to sustain a promise to pay for the same." (See also *McWilliams v. Bridges*, 7 Neb., 419; *Paxton Cattle Co. v. First Nat. Bank of Arapahoe*, 21 Neb., 621.) The occupying claimant's act, Compiled Statutes, chapter 63, section 2, expressly recognizes such improvements as property and subject to taxation, by providing that any person in possession of, or claiming any real estate under, a certificate of entry, or under the homestead or pre-emption laws of the United States, shall be considered as having sufficient title to demand the value of improvements and to demand the amount of all taxes and assessments paid by such claimant or those under whom he claims. As stated by this court in *Bellinger v. White*, 5 Neb., 399, quoting from *Crawford v. Burrell Township*, 53 Pa. St., 219: "Exemptions, no matter how meritorious, are of grace, and must be strictly construed." We hold, therefore, that improvements, placed by individuals upon government land, are, before final proof, the property of such individuals; that the constitution and the statutes passed thereunder contemplate the taxation of all property not specifically exempted, and that such improvements have not been exempted and are subject to taxation. There is a marked distinction between the power to tax improvements and the power to tax the land itself. The relator seeks only to compel a taxation of the improvements.

2. Are the interests of lessees and purchasers of school lands subject to taxation? The principles already dis-

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State, ex rel. Sioux County, v. Tucker.

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cussed go far towards settling this question. The statutes, we think, settle it beyond question. As to lessees, section 5 of the revenue law provides that "leasehold estates, including leases of school and other lands of the state, shall be valued at such a price as they would bring at a fair voluntary sale for cash." This provision demonstrates that leasehold estates in school lands were deemed by the legislature to fall within the designation of taxable property in section 1 of the revenue law, "all real and personal property in this state." The act nowhere exempts such property, and it is at least doubtful whether under the constitution there could be any such exemption. As to purchasers of school land, section 3 of the revenue law provides expressly that "school lands sold under any provisions of any law of this state, or such as have heretofore been sold, shall not be taxable until the right to a deed shall have become absolute, except the value of the interest of such purchasers shall be taxable, which interest shall be determined by the amount paid and invested in improvements on such lands." Even in the absence of this specific provision, section 12 of the revenue law would be broad enough to cover the case. That section provides: "When real estate is exempt in the hands of the holder of the fee, and the same is contracted to be sold, the amount paid thereon by the purchaser, with the enhanced value of the investment and improvement thereon until the fee is conveyed, shall be held to be personal property and listed and assessed as such, in the place where the land is situated."

In *Hagenbuck v. Reed*, 3 Neb., 17, the court held that, under the law as it then stood, school lands sold on credit were subject to taxation. In 1879 an act was passed reciting that such lands "have not been and are not now taxable," and then providing for the repayment of taxes theretofore paid on such lands. This court held in *Washington County v. Fletcher*, 12 Neb., 356, that this act was constitutional, and that its effect was to relieve such lands

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from taxation, or rather to nullify past taxation. From this decision Judge LAKE dissented in a very vigorous opinion. The case related to the repayment of taxes levied before the revenue law of 1879 was passed, and the provisions quoted from that act were not referred to and were not applicable to the case adjudicated. The decisions of this court are not in conflict with the construction we place upon the revenue law.

We think the district court erred in refusing the writ of *mandamus* prayed.

REVERSED AND REMANDED.

SIMEON FARWELL & COMPANY ET AL. V. CHRISTINA A.  
CRAMER.

FILED OCTOBER 17, 1893. No. 4478.

1. **Trial: MISCONDUCT OF PARTY: GROUND FOR NEW TRIAL.**

For a party to object to a question not (standing by itself) material, and then to withdraw the objection when the other party promises to supply the link in the evidence which would make it material, is not misconduct entitling the defeated party to a new trial.

2. ———: ———. Nor is it misconduct for the defeated party to move, upon the close of the evidence, that the jury be permitted to take all the documents offered in evidence with them to the jury room, the record not disclosing that the motion was made in such language, or under such circumstances, as to warrant the inference that it was made for effect upon the jury, and not in good faith.

3. **A married woman may in this state bargain for and purchase personal property, sell the same, and do all acts in relation to such property as though she were single.**

4. **Husband and Wife: TITLE TO PERSONALTY.** There is no presumption of law that personal property in the possession of the wife, while living with her husband, belongs to the husband. *Oberfelder v. Kavanaugh*, 29 Neb., 427, followed.

38	61
40	189
40	515
141	111
38	61
43	734
38	61
54	631
55	544

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5. **Harmless Error: Two CONFLICTING INSTRUCTIONS** in regard to the burden of proof are not prejudicially erroneous where the verdict was against the party upon whom the burden was properly imposed.
6. **Rulings on Admissibility of Evidence: ASSIGNMENTS OF ERROR: REVIEW.** This court will not review upon error the rulings of the district court excluding or admitting testimony, unless the error complained of is specifically assigned in the petition in error with such certainty as to enable the court, upon examination of the record, to ascertain the particular error complained of.

• ERROR from the district court of Holt county. Tried below before NORRIS, J.

*H. M. Uttley*, for plaintiffs in error:

It is improper for the court to require counsel to pre-judge the facts he expects to develop by a certain class of testimony, or for the court in any manner to indicate his idea of certain evidence proposed or offered. (Thompson, Trials, secs. 218, 219; *State v. Tickel*, 13 Nev., 502; *People v. Bonds*, 1 Nev., 33; *McMinn v. Whelan*, 27 Cal., 300; *State v. Harkin*, 7 Nev., 381.)

Instructions which have a tendency to single out isolated facts and confine the attention of the jury to them to the exclusion of all other facts, are not only a misdirection, but are an infringement on the province of the jury as triers of the facts. (*Chappell v. Allen*, 38 Mo., 213; *Grube v. Nichols*, 36 Ill., 93; *Raysdon v. Trumbo*, 52 Mo., 35; *Ellis v. McPike*, 50 Mo., 574; *Reese v. Beck*, 24 Ala., 651.)

The twelfth instruction is erroneous because it misstates the rule that the courts will look with scrutiny, if not suspicion, upon sales or transfers of the property of a debtor in failing circumstances to members of his own family. (*Lipscomb v. Lyon*, 19 Neb., 515; *Koch v. Rhodes*, 10 Neb., 447.)

Evidence that the husband and wife, or either of them separately, were in possession of property, without other

indication of ownership, is presumptive evidence of the title in the husband. (*Keeney v. Good*, 21 Pa. St., 349; *Turner v. Brown*, 6 Hun [N. Y.], 331; *Block v. Nease*, 37 Pa. St., 436; 2 Bishop, Married Women, secs. 128-140; *Glann v. Younglove*, 27 Barb. [N. Y.], 480.)

*M. F. Harrington, contra.*

IRVINE, C.

D. L. Cramer was engaged in the mercantile business in Ewing. He seems to have failed, and his stock of goods was seized and sold upon attachments or executions. The defendant in error, the wife of D. L. Cramer, was at that time conducting a millinery establishment, and some time after the sale of Mr. Cramer's stock she moved her millinery goods into the store-room formerly occupied by Mr. Cramer, and shortly after began to add other lines of merchandise thereto until in the course of a few weeks she seems to have established what is termed a "general store." The plaintiffs in error, who were judgment creditors of Mr. Cramer, caused executions to be levied upon all of the goods except the millinery stock, upon the theory that the goods in fact belonged to Mr. Cramer, while the business was being conducted in the name of his wife for the purpose of defeating his creditors. Mrs. Cramer instituted the present action in replevin against the sheriff, for whom the judgment creditors were substituted as defendants. There was a verdict and judgment in favor of Mrs. Cramer, which the creditors seek to reverse.

1. Numerous errors are assigned. The first is misconduct of plaintiff's counsel. In support of this assignment attention is first called to the following circumstance: It was a part of the creditors' theory that when Mr. Cramer failed he in some way secreted from his creditors certain notes and accounts, and that the goods in question were purchased with the proceeds of these assets. A witness was interro-

gated in regard to these notes and accounts, and upon objection made, an offer was made to prove that notes and accounts to the amount of \$10,000 had been by Cramer "taken out of his business," and that he had them in his possession after the attachments were levied. The court then stated that the objection was sustained unless the defendants "could trace the accounts or connect them." Thereupon counsel stated that he would agree to attempt, and believed he could connect these accounts and their proceeds with the plaintiff as having passed directly into her hands for his use and benefit. Opposing counsel then waived their objection, and the questions were answered. In what way this transaction can be construed as misconduct on the part of counsel is beyond our comprehension. The evidence offered was immaterial, unless the accounts or their proceeds were in some way traced into the goods. It was quite proper for the court to require an offer to so trace them before admitting the evidence, and when that offer was made it was the proper course for plaintiff's counsel to withdraw their objections.

The bill of exceptions shows that at the close of the testimony the plaintiff asked that all the books, exhibits, and records be taken by the jury to their jury room to be considered by them. Counsel moved to strike out this remark as incompetent and an unfair way of trying a case. This motion was overruled. It does not appear that the jury was permitted to take these documents, or that plaintiff's motion was ever acted upon. It was not misconduct entitling a party to a new trial for the adverse counsel to make a motion which should not be sustained. The record does not show that the language of counsel was unbecoming or unfair, and the remark having been made, the court was right in refusing to strike it from the record. It is claimed that throughout the trial counsel for plaintiff, in side remarks to the jury, insinuated that they were anxious that the jury should examine the books during their re-

tirement. Nothing of this kind appears in the bill of exceptions. It is, however, intimated in the brief that the court refused to permit the reporter to take down these remarks. There is nothing in the record to show that there was any such refusal, and we must be governed by the record and not by statements in the brief, unsupported by the record.

2. Certain instructions are complained of. Of these, the first is as follows: "By the laws of this state a married woman, while the marriage relation subsists, may bargain for and purchase personal property such as the stock of goods in controversy, and sell the same and do all acts in relation to said property as though she were unmarried." As to this instruction it is complained, first, that under the married woman's act a *feme-covert* may only carry on a settled course of business on her sole and separate account, and that the instruction ignored these limitations. We think that the act in question was intended to give her the same dominion over her separate property that the husband has over his; to permit her to buy and sell and deal with her own in the same manner that a married man may do.

It is urged that the instruction conflicted with the sixteenth and eighteenth, given at request of defendants. In the sixteenth instruction the jury was told that where the wife claims ownership of property taken from the possession of her husband upon execution against the husband, the burden is upon the wife to show her title to the goods, and how, when, and where she acquired the funds with which she purchased them; and by the eighteenth instruction, that the burden was upon her to show that her possession was for her own, and not for her husband's benefit. We can see no conflict between these instructions and the first, and taking the three together they state the law more favorably to the defendants than could be asked.

The second instruction was practically the same as section 4 of the married woman's act, and the third was a

paraphrase of section 1. It is claimed these instructions are not applicable to the evidence, but the whole theory of plaintiff's evidence was that the goods were hers, bought with her own money, and used by her in conducting her own business; and it was right for the court to tell the jury that the law permitted her to do so.

The seventh, eighth, ninth, and tenth instructions are objected to, first, as reiterative; second, as laying special stress upon some circumstances, and third, as assuming facts not proved. We shall not quote these instructions at length. Each one submitted to the jury a certain hypothesis which, if sustained by the evidence, would render the goods exempt from execution against the husband. They state the law correctly. We cannot see that they give undue emphasis to any portion of the testimony by repetition or otherwise, nor that they assume any facts as established. By each instruction the jury is left to determine whether the facts existed.

Certain other instructions are grouped, and the same objections made against them. The same remarks are applicable.

In the twelfth instruction the jury was told that possession of personal property was *prima facie* evidence of ownership, and that if possession had been shown by the evidence to have been in plaintiff at the time the goods were levied upon by the sheriff, plaintiff's possession was then *prima facie* evidence that the plaintiff was the owner of the goods. It is claimed that this instruction ignores the law in regard to contests between the wife and the creditors of her husband. We think counsel, in his argument, confuses the case of property acquired by the wife from a stranger with that of property transferred to her by her husband. In the latter case the transfer is *prima facie* fraudulent against creditors. To hold the same rule in the former case would be in effect to declare that there is a legal presumption that all property in the possession of a

wife belongs in fact to the husband. Such a rule would not be in harmony with the policy of the married woman's act. (*Oberfelder v. Kavanaugh*, 29 Neb., 427.) The instruction was in direct conflict with the eighteenth instruction given at the defendants' request, and already quoted. We think, however, that the eighteenth instruction misstated the law to the prejudice of the plaintiff, and the conflict between the two instructions could not have misled the jury to defendant's prejudice.

3. It is claimed that the court erred in refusing to admit certain testimony. The plaintiff and one Miller were called as witnesses by both sides. They had already given their depositions on behalf of defendants. These depositions were excluded. Mrs. Cramer's deposition could only be admissible for the purpose of contradicting her testimony or showing admissions made by her. We find nothing in the deposition tending to do either. The deposition of Miller could only be admissible for the purpose of showing contradictory statements made by him. The only matter in the deposition tending to contradict any statements made by him in evidence is upon a point of doubtful materiality, and the questions asked Miller for the purpose of laying a foundation on this point were objected to, the objection sustained, and the sustaining of that objection is not assigned as error.

Complaint is made of the exclusion of certain other evidence sought to be elicited from the witness Cortelyou; but the assignment of error upon this point was that the court erred in refusing to allow the defendants to show by Cortelyou when on the witness stand "according to the offer made by defendants in the record." This assignment is too general. By force of the statute a general assignment of "errors occurring upon the trial" is sufficient in a motion for a new trial, but in a petition in error the assignment should be with sufficient certainty to direct the attention of the court to the particular error complained of. (*Lym'm*

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Headley v. Coffman.

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*v. McMillan*, 8 Neb., 135; *Graham v. Hartnett*, 10 Neb., 518.)

4. It is alleged that the verdict is not sustained by the evidence. We have examined the evidence carefully and think it sufficient to justify the verdict. As counsel in his brief naively remarks, "There are some things which we may know absolutely, and yet, owing to the peculiar condition of things and the perversity of human nature, we are unable to prove the same, either to the satisfaction of the jury or to the satisfaction of ourselves." This case may be one of that class, but the jury must be governed by the evidence, and their verdict was clearly in accordance with the weight thereof.

JUDGMENT AFFIRMED.

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## HARVEY B. HEADLEY V. VICTOR H. COFFMAN.

FILED OCTOBER 17, 1893. No. 5009.

1. **Ejectment: PRE-EMPTOR'S TITLE: CANCELLATION OF ENTRY AFTER ISSUANCE OF FINAL RECEIPT.** The holder of a receiver's certificate cannot, after the entry upon which the paper was issued has been canceled, maintain an action of ejectment against a party claiming under the United States, for he has only an equitable title, and this notwithstanding section 411 of the Code of Civil Procedure, making such certificate proof of title equivalent to a patent against all but the holder of an actual patent. *Morton v. Green*, 2 Neb., 441, followed.
2. ———: ———: ———: **REFUSAL OF GOVERNMENT TO ISSUE PATENT.** In such case, the authority of the commissioner of the land office to cancel the entry is not material. The refusal of the government, whether rightful or wrongful, to convey the legal title to the entryman, prevents him from maintaining ejectment against one in possession under a subsequent entry.

ERROR from the district court of Custer county. Tried below before GASLIN, J.

The opinion contains a statement of the case.

*Harry E. O'Neill* and *Alpha Morgan*, for plaintiff in error :

Until the patent is issued the fee of the land remains in the United States. After payment of the purchase money by the entryman, and the receipt of it by the officers of the United States, the government may still decline, on various grounds, to perfect his title by the execution of a patent. Nothing but the patent passes the fee, and before its issue, the entryman has but a qualified and contingent estate in the lands. Ejectment cannot be maintained upon an equitable title. (*Bagnell v. Broderick*, 13 Pet. [U. S.], 436\* ; *Stringer v. Young*, 3 Pet. [U. S.], 320\* ; *Boardman v. Reed*, 6 Pet. [U. S.], 328 ; *Stoddard v. Chambers*, 2 How. [U. S.], 284 ; *Wilcox v. Jackson*, 13 Pet. [U. S.], 516 ; *Daroy v. McCarthy*, 12 Pac. Rep. [Kan.], 104 ; *Morton v. Green*, 2 Neb., 456 ; *Hooper v. Scheimer*, 23 How. [U. S.], 235 ; *Fenn v. Holme*, 21 How. [U. S.], 482 ; *Vantongerren v. Heffernan*, 38 N. W. Rep. [Dak.], 52 ; *American Mortgage Co. v. Hopper*, 56 Fed. Rep., 67 ; *United States v. Steenerson*, 50 Fed. Rep., 504 ; *Swigart v. Walker*, 30 Pac. Rep. [Kan.], 162 ; *Fernald v. Winch*, 31 Pac. Rep. [Kan.], 665 ; *Pierce v. Frace*, 26 Pac. Rep. [Wash.], 192 ; *Jones v. Meyers*, 26 Pac. Rep. [Idaho], 215 ; *Ferry v. Street*, 11 Pac. Rep. [Utah], 571 ; *Randall v. Edert*, 7 Minn., 359 ; *Gray v. Stockton*, 8 Minn., 472 ; *Smith v. Custer*, 8 Dec. Dep. Int., 269.)

*Phelps & Sabin, contra :*

A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged fraud in obtaining it; but in such case the government must seek redress in the courts,

where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances. A purchaser in good faith, and for a valuable consideration, from a pre-emptor of the land included in the latter's certificate of purchase takes the same purged of any fraud which might have been committed in obtaining said certificate. (*Smith v. Ewing*, 23 Fed. Rep., 741; *Moore v. Robbins*, 96 U. S., 538; *Perry v. O'Hanlon*, 11 Mo., 585; *Brill v. Stiles*, 35 Ill., 309; *Cornelius v. Kessel*, 58 Wis., 241; *Lindsey v. Hawes*, 2 Black [U. S.], 554; *Groom v. Hill*, 9 Mo., 324; *Deffebach v. Hawke*, 115 U. S., 392; *Carroll v. Safford*, 3 How. [U. S.], 441; *United States v. Freyberg*, 32 Fed. Rep., 195; *Wirth v. Branson*, 98 U. S., 118; *Wilson v. Fine*, 40 Fed. Rep., 52; *Stimson v. Clarke*, 45 Fed. Rep., 760; *Cornelius v. Kessel*, 128 U. S., 461; *Simmons v. Wagner*, 101 U. S., 260; *Sanford v. Sanford*, 139 U. S., 642; *Witherspoon v. Duncan*, 4 Wall. [U. S.], 210; *Hardin v. Jordan*, 140 U. S., 371; *United States v. Budd*, 43 Fed. Rep., 630; *Franklin v. Kelley*, 2 Neb., 89; *Jones v. Yoakum*, 5 Neb., 265; *Bellinger v. White*, 5 Neb., 399; *Donovan v. Kloke*, 6 Neb., 124; *Carroll v. Patrick*, 23 Neb., 846; *Colorado Coal & Iron Co. v. United States*, 123 U. S., 308.)

IRVINE, C.

We are met at the outset of this case by a question as to the jurisdiction of this court to review the judgment rendered in the district court. A transcript was filed as for an appeal more than six months after the rendition of judgment in the district court. There was a motion to dismiss the appeal, which was overruled by this court, and the appellant given leave to file a petition in error. We are cited to the recent decision of *Fitzgerald v. Brandt*, 36 Neb., 683, as sustaining the position that the case is not now properly before this court for review. We regard the order of the court permitting the appellant to file a petition in

error as the law of this case and sustaining the jurisdiction of the court to review the judgment as upon error. The action was one in ejectment instituted by Coffman against Headley to recover a quarter section of land in Custer county. It was submitted to the district court upon the pleadings and an agreed statement of facts, which has been incorporated into a bill of exceptions. On the 25th of August, 1884, William T. Hughes made proof of settlement and cultivation of the land in question, and made payment to the government of the purchase price under the pre-emption laws of the United States, and received the receiver's final receipt therefor. On September 2, 1884, Hughes conveyed by warranty deed to the Brighton Ranch Company, which on May 25, 1887, conveyed by quitclaim to one Hungate, who later conveyed to the plaintiff. On December 15, 1886, Headley filed in the United States land office at North Platte an affidavit of contest of the entry of Hughes upon the ground that at the time of making proof Hughes did not reside on the land as required by law; that he had not cultivated and improved it as required, and that his entry and proof were not made in good faith for his own use and benefit, but were made in fraud of the United States, and for the use and benefit of others. A hearing was ordered upon notice to Hughes, the result being that the general land office ordered Hughes' entry to be canceled, and permitted Headley to make a homestead entry under which Headley entered into possession of the land. No patent has been issued. Coffman claims under Hughes' entry, and the final receipt issued to him. Headley, to defeat the action, contends that under the circumstances ejectment will not lie and that the cancellation of Hughes' receipt divested him and his grantees of all interest in the land.

We have been cited to a vast volume of authorities bearing more or less upon the questions at issue. These authorities seem at first reading to be so divergent as to confuse, rather than to assist in forming a conclusion.

Even the cases in the supreme court of the United States seem at first to conflict with one another. A closer examination does not entirely reconcile all the cases, but where the conflict remains, it is due rather to general language in the opinions than to any conflict in the decisions themselves. General expressions have been made use of in the opinions, correct enough when applied to the case under discussion, but which, segregated from the facts of the case, have given rise to an unfortunate effort to apply them to other cases, and other facts. To attempt a review of the authorities sufficiently complete to be of value would prolong this opinion to a length not justified by the object sought. A number of the cases relate to the right of states to tax land which has been purchased from the government, and full payment made, before the issuance of the patent. The leading case upon this subject seems to be *Carroll v. Safford*, 3 How. [U. S.], 441. This line of cases goes upon the ground that upon final payment the land becomes in equity the property of the purchaser. In no such case had the question of conflicting claims been determined. Other cases, such as that of the *Colorado Coal & Iron Co. v. United States*, 123 U. S., 307, have been direct proceedings in equity by the United States to cancel a patent already issued. Others again, like *Stoddard v. Chambers*, 2 How. [U. S.], 284, have related to conflicting patents to the same lands. Others again, like *Lindsey v. Hawes*, 2 Black [U. S.], 554, have been suits in equity to compel a conveyance by the patentee to one having a prior right. These cases depend upon principles so different from those involved in the present case that general language used in the opinions must be considered with great caution.

*Fenn v. Holme*, 21 How. [U. S.], 481, and *Hooper v. Scheimer*, 23 How. [U. S.], 235, represent a class more nearly applicable. Those cases were in ejectment, no patent having yet been issued for the land. There the plaintiffs relied on the certificate re-enforced by state statutes some-

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thing similar to section 411 of our Code, and it was held that the plaintiff could not recover, because, until patent issued, the title remained in the United States, and the state statutes referred to were not binding upon the federal courts. *Bagnell v. Broderick*, 13 Pet. [U. S.], 436, differed from these cases in the fact that the certificate upon which one party relied was met by a patent to the adverse party. In that case the following forcible and significant language was used: "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; \* \* \* until the issuance of a patent the fee is in the government. \* \* \* Nor do we doubt the power of the states to pass laws authorizing purchasers of lands from the United States to prosecute actions of ejectment upon certificates of purchase against trespassers on the lands purchased; but we deny that the states have any power to declare certificates of purchase of equal dignity with a patent."

*Wirth v. Branson*, 98 U. S., 118, and other cases of the same class, establish the doctrine that after the right to a patent becomes complete, a subsequent sale, the first remaining in force and not vacated, is absolutely void.

*Cornelius v. Kessel*, 128 U. S., 456, fixes certain limitations upon the power of the land department to revoke and cancel entries, but recognizes its right to cancel on account of disqualification of the party, or on account of the lands not being subject to entry.

We think it may be safely said that all the cases treat the subject upon the principle that the purchaser's rights are the same as they would be had the purchase been made from an individual under similar contractual relations. This principle is over and over again announced. If we accept it as a starting point, the solution of the present case is not difficult. Coffman had, by his acts and entry, entered into a contract with the United States, whereby the land was to be eventually conveyed to him. One of the

terms of that contract was that he should make proof at a certain time and in a certain manner that he had complied with certain of the conditions imposed. This proof was made. Headley thereafter brought to the attention of the proper officers the charge that the proof so made was false and fraudulent. The officer charged with the general supervision of the sale of public lands and issuance of patents, upon an investigation determined such charges to be well founded, and refused to issue the patent. This action is ejectment, and the plaintiff must recover upon the strength of his own title, and that title must be legal in its character. All the cases hold that, as between the United States and the purchaser, while the equitable title is complete in the purchaser when he has done everything upon his part to entitle him to a patent, yet the legal title passes only by the patent itself. The vendor then in this contract of sale, learning, or at least believing, that the conditions of the contract had not been performed, and that fraud had been perpetrated against it, refused to complete the sale by the conveyance of the legal title. It matters not in this case whether the commissioner of the land office had authority to cancel the entry, or whether the proceedings resulting in that act were *coram judice*. The important fact is that he did refuse to issue a patent, and the legal title did not pass out of the United States. Had the transaction been one between individuals, the vendor might, in a suit for specific performance, rely for defense upon the very matters which led the commissioner to refuse a conveyance, and upon proof of those facts defeat the case. The vendee could not recover in ejectment against the vendor, nor against the vendor's subsequent grantee. If he can do so here, it must be by virtue of section 411 of the Code, which provides that "the usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver, that the books of his office show the sale of a tract

of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."

There can be no doubt that a state has power to protect the possessory rights of purchasers of government land against trespassers by means of such a statute. The state cannot, however, provide by law for the disposition of lands of the United States. It cannot enact that as against the United States, or persons claiming under the United States, the United States has parted with the legal title to lands when, by statutes and repeated decisions, the United States, in the exercise of its exclusive authority to dispose of the public lands, has declared that title shall not pass except by other conveyance. Were this a case between the holder of a final receipt, not resisted by the United States, and some one claiming under an independent title, the statute could be given force and effect; but we have here a contest between the holder of a receipt which the United States has repudiated, and one who claims under a subsequent contract of purchase from the United States itself. For this court to declare that by force of the statute the United States had divested itself of the title in such a manner as to permit the plaintiff to maintain ejectment against the subsequent vendee, would be in effect to wrest from the federal government its power of control over the disposition of its own lands, and to permit the state to nullify federal laws relating to a subject wholly within the powers of the federal government.

In *Morton v. Green*, 2 Neb., 441, the same view was taken by the majority of the court under very similar facts. The reasoning of Judge CROUNSE in that case seems to us conclusive. In fact we might very shortly have disposed of the present action by a reference to that opinion, had it not been contended that the dissenting opinion of Chief Justice MASON had been approved in later cases. The only case giving color to that theory is *Carroll v. Patrick*, 23 Neb., 834. It was there held that the statute of limitations

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began to run against the entryman from the date of entry. That was a case, however, where the plaintiff relied upon adverse possession, and that alone, as proof of title. The entryman might have maintained ejectment against him from the time of receiving his certificate, the case being one of the class to which we have held that section 411 of the Code applies. The language of Chief Justice MASON was cited in *Carroll v. Patrick* with approval, and it was a correct statement of the law as applied to the case there under discussion, which was not a case like *Morton v. Green*. We think, therefore, that the plaintiff did not show title in himself to sustain an action of ejectment.

REVERSED AND REMANDED.

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S. H. HOOPS, APPELLANT, v. STEPHEN R. MCNICHOLS  
ET AL., APPELLEES.

FILED OCTOBER 17, 1893. No. 5036.

**Decree: APPEAL: REVIEW.** Where, upon appeal, it appears that the decree in the district court granted to the appellant all the relief by him sought, the judgment will be affirmed without regard to the merits of the decree.

APPEAL from the district court of Holt county. Heard below before KINKAID, J.

*Uttley & Benedict* and *H. M. Uttley*, for appellant.

*G. M. Cleveland*, contra.

IRVINE, C.

This suit was begun by Hoops against McNichols, C. C. Clark, Libby Cullumber, and the Farmers Loan & Trust

Company, to foreclose a mortgage upon certain land in Holt county. A mortgage had been executed by McNichols in favor of the Farmers Loan & Trust Company, and by that company assigned to the plaintiff. The only allegation in regard to the defendant Cullumber was that she "has or claims to have some right, title, or interest in and to said premises," and that whatever interest she has is junior to the lien of the plaintiff.

The defendant Cullumber answered setting up that she was the owner and in possession of the premises; that the interest of McNichols was created by a receiver's receipt made to him March 28, 1887, and that afterwards, upon charges preferred, and upon notice to McNichols, the receipt and entry were canceled for false testimony in making proof; and that no patent had ever been issued. Hoops demurred to this answer. The demurrer was overruled, and a reply was filed denying all the allegations in regard to the contest and cancellation of McNichols' entry, and denying the authority of the commissioner of the land office to cancel such entry, and alleging the interest of Cullumber was derived through an entry made upon the land by force and in fraud of the laws of the United States. The answer above referred to closes with a prayer for the dismissal of the action.

The decree establishes plaintiff's mortgage, determines the amount due, and declares the mortgage to be "the first lien on said described land and paramount and superior to any right, title, lien, or interest in, to, or against the same, of any of the defendants in this action," and in default of payment within twenty days, orders a sale of the premises. The decree also contains the following paragraph:

"The court further finds that the title of defendant, Stephen R. McNichols, in and to said premises was based solely on a receiver's final receipt issued to him by the officers of the local United States land office on the 28th day of March, 1887, and that on the 15th day of January, 1889, a receiver's final receipt was issued by the officers of said

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local United States land office to defendant Libby Cullumber of the whole tract of land; and that no patent for said land has yet issued to either party, and the legal title to said land is still in the government of the United States, and this court has no jurisdiction to decide the respective rights of the claimants, Stephen R. McNichols and Libby Cullumber."

• McNichols had not appeared in the action and there were no issues between McNichols and Cullumber to try. The plaintiff appeals.

We cannot see what there is in the decree of which he can complain. The court simply declined to determine the conflicting claims of McNichols and Libby Cullumber, but did find distinctly that the plaintiff's mortgage was paramount and superior to any right or title of any of the defendants. Libby Cullumber has not complained of the decree. The plaintiff is not prejudiced by the refusal of the court to adjudicate between McNichols and Cullumber an issue not presented by the pleadings. The decree does adjudicate the conflicting claims of plaintiff and Libby Cullumber, and adjudicates them in favor of appellant. The judgment should be

**AFFIRMED.**

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**MATILDA HUEBNER, APPELLEE, V. EMMA SESSEMAN,  
ADMINISTRATRIX, ET AL., APPELLANTS.**

FILED OCTOBER 18, 1893. No. 5060.

1. **Executors and Administrators: FINAL ACCOUNT: PAYMENT OF CLAIMS NOT PRESENTED FOR ALLOWANCE.** In the final settlement of an estate of a decedent, whether originally in the county court or upon appeal in the district court, the administrator is entitled to no credit for payment of provable claims against the estate of his decedent, which, originating before his death, have not been presented or allowed as provided by law.

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2. ———: FINDING UPON CONFLICTING EVIDENCE: REVIEW. The finding of the district court, upon conflicting evidence that the services of an attorney for which his bill had been rendered against the estate of a decedent were in fact rendered for another than the decedent, will not be reviewed by this court.

APPEAL from the district court of Douglas county.  
Heard below before DOANE, J.

The facts are stated in the opinion.

*B. G. Burbank*, for appellants:

The administrators should be allowed in their final account for money paid out of the funds of the estate to discharge debts legally due and owing from said estate, notwithstanding said claims were not filed and allowed by the probate judge before the final account of the administrators had been filed. (*Sims v. Sims*, 30 Miss., 341; *Haralson v. White*, 38 Miss., 178; *Hill v. Buford*, 9 Mo., 505; *Terrell v. Rowland*, 86 Ky., 79.)

*Congdon & Clarkson*, contra:

The evidence offered by the administrators and rejected by the court, under the exceptions to the allowance in their final account of such claims as had not been filed and allowed by the probate court, was properly rejected. (Secs. 214, 217, 223–226, ch. 23, Comp. Stats., 1887; *Millett v. Early*, 16 Neb., 268; Schouler, Administrators and Executors, sec. 420.)

Such claims not having been filed within the time originally fixed by the court, or within the one extension, were barred. (Schouler, Administrators and Executors, sec. 390, note 4, and cases; 2 Wood, Limitations, sec. 188, note 5, and cases; *Bunnell v. Post*, 25 Minn., 376.)

Neither the courts nor administrators have authority to allow claims against an estate after time fixed expires, unless time is extended in manner provided by statute. (*Mc-*

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*Gee v. Atkinson*, 33 N. W. Rep. [Mich.], 737; *Nichols v. Shearon*, 4 S. W. Rep. [Ark.], 169.)

Administrators are not entitled to credit in their final accounts for debts paid which were not filed as claims and allowed by the probate court. (*Jacobs v. Morrow*, 21 Neb., 233.)

RYAN, C.

The final report of the administrators of the estate of Carl Sesseman, deceased, was filed in the probate court of Douglas county, Nebraska, on the 21st day of November, 1889, from which it appears that the assets of the estate just equaled the liabilities; that is, each was \$10,745.78. The deceased, Carl Sesseman, left a will whereby he bequeathed to Matilda Huebner, appellee, \$1,000, which will was duly probated and allowed in the said county court. The administrators appointed under said will (the executor named therein having failed to qualify) were William G. Bohn and Emma Sesseman, wife of the deceased, who gave bond as required by law, and entered upon the administration of the estate. To the above mentioned final report of the administrators of said estate there were filed exceptions by Matilda Huebner, and certain of said exceptions were sustained by the county judge, and a decree was entered in accordance with the finding by him made. Thereafter an appeal was taken to the district court of Douglas county from said decree. On the 22d day of May, 1891, said cause came on for hearing and a decree was entered therein, refusing the allowance of the sum of \$5,544.43 claimed by the administrators aforesaid. To this finding exception was duly taken, and the case is now before this court for a settlement of the account of the administrators in the execution of their trust.

The main contention in this case resulted in the following finding: "4th. That said administrators have paid out of the assets of said estate, and claim credit therefor in said

account the several sums set opposite the names of the respective parties given below, whereas no such claims had been allowed against said estate nor were due therefrom." These claims were twenty-nine in number and for different amounts, the aggregate of which was \$5,176.46. It was thereupon ordered and adjudged by the court that the payments made by said administrators, amounting to the sum of \$5,176.46, be disallowed in their said account, and that said sum be deducted from the total credit asked for by them in said account. The rejection of this sum of \$5,176.46 was for the reason as stated in the exception and in the decree, that no such claims shown in said final report to have been paid by said administrators had ever been filed in the county court or allowed by the judge thereof. Upon the trial in the district court the record disclosed the following proceeding:

"The plaintiff offers the order limiting the time within which the creditors should present their claims, which was fixed at six months, and the order limiting the time in which the estate should be settled, which was fixed at a year, which order was made on the 24th day of February, 1888, which is admitted as correct by both parties. It is admitted by both parties that due notice of the time and place of presenting claims of creditors under this order was given."

This was agreed to by counsel for the administrators, except as to the time in which the creditors were finally to file their claims, the said counsel claiming there was a subsequent order. It was conceded by the opposite counsel that if there ever was any such subsequent order it might be considered in proof. This devolved upon the administrators the burden of showing the order extending the time for filing claims, and as no proof was made of any such extension, it may fairly be presumed that none was made.

Upon the trial of the case, W. G. Bohn, one of the administrators, was called and sworn on the part of the

defendants. Thereupon there was made an offer as follows:

"The defendants now offer to prove by the witness on the stand that each of the claims against the estate of Carl Sesseman, as shown by the vouchers filed in the probate court of Douglas county, Nebraska, are valid, legal, and lawful claims or accounts against Carl Sesseman's estate, and they were such valid, legal, and lawful claims at the time of his death and at the time they were paid by the administrators of his estate, as shown by the vouchers on file in said court, and that no part or portion of the debt or debts as shown by the several vouchers had been paid, and all were due and payable. The vouchers referred to are for all the claims credited to the administrators in their final report, except those claims allowed by the county court under date April 24, August 23, and November 23, 1888; said claims being rejected by the county court upon the hearing of the final account of the administrators.

"By the court: If you propose to show by the proofs that any of these claims which you now offer have been, any of them, presented and allowed by the county judge, or by the commissioners, you may do so.

"By Mr. Burbank: With reference to none of those which I now make the offer do I so contend.

"To each and every one of the vouchers offered, with the exception of such as may possibly be for legitimate expenses of the estate, such as funeral expenses or expenses properly paid to attorneys, or anything connected with the last sickness of the deceased, there is no objection, and to every and each of said vouchers which represent claims filed against the estate as due from Carl Sesseman in his lifetime, which said claims were not presented and allowed by the county judge, the plaintiff objects, as irrelevant and incompetent.

"By the court: The objection is sustained to those claims as against the estate, and which were not presented and allowed by the county judge.

"To which the defendants except."

The above offer of the vouchers and receipts for money paid out by the administrators, together with the offer to prove that they were legitimate claims against the estate at the time they were paid, and were then due and owing, and that no part thereof had been paid, raises the only question of importance in this case, and that question is, whether or not it is an indispensable prerequisite that the judge of the county court allow such claims upon the hearing upon the administrators' final report.

Section 214, chapter 23, Compiled Statutes, is in the following language: "When letters testamentary or of administration shall be granted by any probate court, it shall be the duty of the probate judge to receive, examine, adjust, and allow all claims and demands of all persons against the deceased, giving the same notice as is required to be given by commissioners in this subdivision."

Section 217 provides that "The probate court shall allow such time as the circumstances of the case shall require for the creditors to present their claims to the commissioners for examination and allowance, which time shall not in the first instance exceed eighteen months nor be less than six months, and the time allowed shall be stated in the commission."

It is provided by section 226 of the same chapter, that "Every person having a claim against a deceased person proper to be allowed by the judge or commissioners, who shall not, after the giving of notice as required in the 214th section of this chapter, exhibit his claim to the judge or commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever."

The appellants contend that notwithstanding the provisions of section 226, just quoted, the probate court in the first instance, and the district court on appeal, should have permitted the testimony offered to establish, as credits in

favor of the administrators, the several claims of which they had made payment without probate or allowance.

In support of this contention there is cited the case of *Sims v. Sims*, 30 Miss., 333. As the reference to this case seems to be with considerable confidence, it will be considered carefully, with the view to ascertaining whether or not it sustains the position contended for. The following language is quoted from the opinion itself: "The first question arose upon the rejection by the court below of certain claims against the estate which the executor had paid, and which had not been probated and allowed in due and usual form, and which were not proved to be valid claims, upon exceptions taken to them. It is clear that the court acted properly in refusing to allow these claims in the executor's final statement. The rule to be adduced from the provisions of the statutes in relation to the establishment of claims against the estate of deceased persons is plainly this: If the executor or administrator, having sufficient funds in his hands, pay a claim which is duly probated and allowed, *prima facie* he is entitled to an allowance for the same in his final account; but, if he pay a claim not probated and allowed, *prima facie* he acts in his own wrong, and he will not be entitled to an allowance for it, unless he adduces competent evidence before the court that the claim was just and valid, and that it remains unpaid at the time it was paid by him. Under this rule the claims numbers 20, 22, and 28, in the bill of exceptions, were properly rejected."

By reference to the several claims numbers 20, 22, and 28, it will be found that the first in order was for the payment of a note due one Underwood, and that the note was not paid by the executor at all. The testator was a member of the firm of Sims & Redus. After his death, Redus became a partner of the firm of Gates & Redus, to whom the business of the old firm was transferred. This house paid to the executor such portions of the effects of the old

firm as at various times came into its hands. This note was paid by this firm for the testator, and the receipt shows it. The executor only charges himself with such sums as his survivor may pay him, and in their settlements with him they doubtless deducted the sums thus paid in the discharge of this note. The executor never paid it, and the allowance to him of that amount would be a loss of that sum to the estate. There is not a particle of proof or reason why this note should be allowed. The language just used is, for the most part, a quotation from the brief of counsel, which purports to state the facts as to the separate vouchers. This also describes voucher number 22 as of the same nature as 20, which is described. As to voucher 28, referred to in the opinion, it seems that there was no evidence that it was ever paid. This condition of the claims under consideration by the court would manifestly render of little force the language quoted, to-wit: "That if he pay a claim not probated and allowed, *prima facie* he acts in his own wrong, and he will not be entitled to an allowance for it, unless he adduce competent evidence before the court that the claim was just and valid, and that it remained unpaid at the time it was paid by him." Obviously this language was not necessary in the disposition of the three claims which were under consideration by the court. This language was therefore *obiter dictum*, not at all necessary in the adjudication of the case under consideration. The only other question in that case decided was, whether or not the administrator was entitled to an allowance of certain indebtedness which was due from the decedent to himself during the decedent's lifetime. The opinion shows that the administrator had done all he could legally do to assert and adjust these claims by having them probated and allowed, and registered in the records of the probate court as claims against the estate, and they were therefore held provable. In this lies the distinction between that case and the one which we have under consideration.

The appellants also cite the case of *Haralson v. White. Executor*, 38 Miss., 178. The credit which the executor sought to have allowed him in that case was because of the seizure and sale, upon execution on a judgment against the testator, of a slave, with which of course the executor had been charged in his original account. The court held that it was proper to show the sale aforesaid upon execution, and that it was unnecessary to introduce in evidence the record leading up to and including the judgment upon which the execution was founded. In our view, this case is not a warrant in any respect for the contention of the appellants.

The only other citation made by appellants is that of *Hill v. Buford*, 9 Mo., 869. The syllabus fully states all that was decided in that case, and is, therefore, quoted at length. It is as follows: "A, being bound as indorser for B on a note in bank, B executed an obligation with C as security, binding themselves to 'secure and keep safe the said A from all loss or damage which he might sustain' on account of such indorsement. A died, and the note becoming due, E and F, his executors, renewed the note in their name, and had to pay the last note. E had the amount paid by him allowed against A's estate. It was not shown that F had had his claim allowed. *Held*, That E and F, as executors of A, might recover for the whole amount paid by them, and the jury might infer that the payment by F was made for the estate of A." While there is some language in the opinion that, isolated and alone, seems to favor the contention of the appellants, yet, taken in connection with the facts, it is clear that they afford but little countenance to the administrators in this case as to the allowance of their claims.

We think that the authorities to which we will now refer correctly state the law applicable to the facts of the case at bar.

In *Nichols v. Shearon*, 4 S. W. Rep. [Ark.], page 169, the following language occurs: "It is true the administrator's

settlements and the testimony taken show that he had paid several other debts which Shearon owed to wards for whom he had been guardian in his lifetime. These payments were doubtless made in good faith, but the administrator had no right to pay them as they were never proved up against the estate. The administrator seems to have acted upon the idea that the debts were incurred in a fiduciary capacity, and that this dispensed with the necessity of their being regularly probated. Shearon was a trustee for his wards as long as he lived, but when he died his indebtedness to the trust became a simple demand against his estate, which required to be sworn to, to be presented to the administrator within two years from the date of his letters, to be allowed, classified, and paid like any other debt he owed."

In *Bunnell v. Post*, 25 Minn., on page 380, is reported the following language of Berry, J., delivering the opinion of the court: "The appellant Bunnell is an executrix of the last will of Russell Post. Commissioners were duly appointed to receive, examine, and adjust all claims against the testator's estate. Proceeding duly and regularly in all respects they completed and filed a report. The appellant, while executrix, paid out of funds not belonging to the estate claims against the same to the amount of \$5,000. These claims were valid against the estate and would have been properly allowable by the commissioners had they been presented. They never were presented and, of course, were never allowed. The appellant asks that her payments of the claims mentioned may be allowed to her in the settlement of her account as executrix. The general rule prescribed by statute is, that all claims against the estate of a deceased person must be presented to commissioners; otherwise they are barred. (Gen. Stats., ch. 53, sec. 14; *Commercial Bank of Kentucky v. Slater*, 21 Minn., 174.) To this rule some exceptions are made by statute, but none of the exceptions apply to this case. If an executor pays

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claims against the estate of his testator, such as are required to be submitted to commissioners, there is certainly no reason why he should stand in any better position, as respects such claims, than the creditors to whom he paid them would have stood if he had not paid them. Before they can be allowed against the estate, either upon the settlement of the executor's account or otherwise, they must have been presented to and allowed by commissioners, or if disallowed by them, they must have been allowed upon the appeal provided by law. To hold otherwise would be to hold that the inflexible rule of law prescribed by the statute may be wholly disregarded at the pleasure of an executor. The reason for upholding the rule is just as strong where a claim has been paid by an executor as where it is retained by the original creditor. In both cases there is the same necessity that the claim shall be examined and adjusted by the authorized tribunal, and that it should be barred if not so examined and adjusted in the manner provided by law."

The language of our statute, sec. 226, ch. 23, Comp. Stats., imperatively provides that if there is a failure to exhibit a claim within the time limited by the court for that purpose, it shall be forever barred, either as a demand or as being used as a set-off in any action whatever. There is no matter of construction left by this statute enabling any one having a claim to establish it against an estate after the time fixed for that purpose. It is necessary to the speedy settlement of estates that claims should be filed within a reasonable time, and there exists in the probate court the right to fix that time. In the case at bar the time was fixed, and had long passed before any attempt was made to present the claims now in controversy. When such an attempt was made, it was by the administrators acting under a will of the decedent, of whom the law required a speedy and strict compliance with its provisions. In favor of such claimants there exists no equity which will not more strongly operate in favor of others who are charged with

no duty in respect to the speedy administration of the estate. To the administrators, therefore, it was proper that the statute should be applied with full force according to the very letter. The administrators having paid these claims without warrant of the court, and in violation of the provisions of the statute, were, after the time for filing and allowing claims, wholly without remedy, and the district court properly rejected the items aggregating a total of \$5,176.46.

There was another contention as to the refusal of the court to allow an item of attorney's fees and for the attorney's expenses, amounting in the aggregate to \$316. As to these items, the court found that they "are charges made for services rendered in various cases and matters which the court finds from the testimony that this estate was not a party to nor interested in; that said charges were not therefore proper to be made against this estate; and that the payments so made by said administrators were unauthorized and should not be allowed in their account." An examination of the evidence discloses that some of the items involved in this attorney's bill were services rendered before the death of the decedent; others were apparently rendered afterwards. In respect to the first class, of course, the observations already made would apply. In respect to all the items in this bill, it may be observed that the testimony leaves it in doubt whether the services were rendered for the decedent and his estate, or for the Bohn Manufacturing Company. They were in respect of certain claims which had existed in favor of the decedent, and which he had assigned to the Bohn Manufacturing Company as collateral security for items of a running account with said company. It was testified to by the attorney who filed the bill, that it was understood that the decedent was to pay all these expenses, and hold the Bohn Manufacturing Company harmless in respect thereof, and, in fact, that the decedent had so informed the attorney. As has already been

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observed, the testimony is not clear whether the proper party chargeable with this indebtedness is the Bohn Manufacturing Company or the estate of the decedent. In this condition of the evidence the findings of fact quoted settle this proposition that the charges were made for services rendered in various cases and matters which the court finds, from the testimony, that this estate was not a party to, nor interested in. If the estate was not a party to, nor interested in, the litigation in respect of which these services were rendered for which these charges were made, of course the estate cannot be chargeable therewith; and on this consideration, as well as on account of the failure to file and probate the claims for services rendered before the death of the decedent, the district court properly rejected the amount of this bill, which the administrators claim they had already paid.

These observations dispose of the only contentions which arose upon the trial of this case, and as we fully concur with the views entertained by the district court, its judgment is

AFFIRMED.

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40	651
41	127
38	90
42	522
42	907
38	90
45	302
38	90
47	890
48	73
48	236
48	555
48	637
38	90
49	458

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY  
V. STANISLAUS GRABLIN, ADMINISTRATOR.

FILED OCTOBER 18, 1893. No. 4355.

1. **Railroad Companies: CHILD ON TRACK: DEATH BY WRONGFUL ACT: NEGLIGENCE: PLEADING: EVIDENCE.** An administrator sued a railroad company for damages for negligently killing his intestate, a boy nine years old, by running an engine against him while he was on the railroad track. The grounds of negligence averred in the petition were (a) the failure of the railroad company to fence its track; (b) the neglect of those in charge of the engine to signal its approach by bell or whistle; (c) that the train was not on schedule time; (d) that it was run at a high rate of speed; and (e) that it was not equipped with

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air-brakes. *Held*, That under these allegations evidence that the engineer, had he been exercising a careful and vigilant lookout, could have seen the boy in time to have stopped the train, was inadmissible.

2. ———: ———: ———: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. In such an action, where it is claimed by the defense that the injury resulted from the contributory negligence of the deceased infant, it is proper for the court to instruct the jury that in determining whether or not he was guilty of negligence they should take into consideration his age and discretion, and that the same degree of caution and care should not be required of him as in the case of an adult under similar circumstances. *Huff v. Ames*, 16 Neb., 139, followed.
3. ———: ———: ———: FAILURE TO FENCE TRACK: LIABILITY FOR DAMAGES. Where a child, to whom negligence is not imputable by reason of his tender years and lack of discretion, goes upon a railroad track in consequence of the failure of the railroad company to fence the same as required by statute, and is killed by an engine, the parents of the child exercising at the time ordinary care in the premises, the railroad company is liable.
4. ———: RATE OF SPEED: NEGLIGENCE. Outside the limits of cities, villages, and towns negligence cannot be imputed to a railroad company solely by reason of the speed of its train, however great. Whether under the circumstances the rate of speed is negligence is a question of fact.
5. ———: NEGLIGENCE: FAILURE TO EQUIP TRAIN WITH AIR-BRAKE. It is the duty of railroad corporations to adopt and use tried and proved modern machinery and appliances in the operation of their roads and in the management and control of their trains. The air-brake is among the modern tried and proved appliances that have become a necessity for the safe operation and management of railroad engines and trains, and the neglect of a railroad company to equip its trains with such brake may be negligence.
6. ———: ———: CHILD KILLED ON TRACK: LIABILITY OF COMPANY FOR DAMAGES. Where a child, no contributory negligence appearing, while trespassing on a railroad company's track, is struck by an engine and killed, the railroad company is liable for damages, if the engineer in charge of the engine, by the exercise of such careful and vigilant lookout as was consistent with his other duties, could have seen the child in time to have prevented the accident.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

The facts are stated in the opinion.

*O. A. Abbott*, for plaintiff in error:

The company owes trespassers upon its tracks for right of way but one duty, to-wit, to use all possible efforts to avoid injury to them after they are discovered upon its tracks or right of way. If it has performed that duty, it is not liable to them for any injury they may sustain. Neglect by the company to perform duties it may have owed to others, as, for instance, its neglect to keep a vigilant outlook for obstructions, is a duty it owes to its passengers; but trespassers have no right to complain of any failure of duty toward passengers. Some duty owed to them must have been neglected to give them a standing in court. (*St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark., 41, 4 Am. & Eng. R. Cases, 608; *Chicago & A. R. Co. v. Becker*, 76 Ill., 30; *Morrissey v. Eastern R. Co.*, 126 Mass., 380; *Johnson v. Boston & M. R. Co.*, 125 Mass., 79; *Sherman & Redfield, Negligence* [4th ed.], secs. 5, 8, 15; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan., 358; *Meyer v. Midland P. R. Co.*, 2 Neb., 339.)

*John H. Ames* and *Marquett & Deweese*, also for plaintiff in error:

The plaintiff's intestate, at the time of the accident, was a trespasser upon the railway company's right of way and railroad track. The place of the casualty was nearly eight hundred feet from any lawful crossing. The intestate was not invited to the place, either especially or generally, as one of the public for the purpose of the transaction of business. It does not appear that he had any occasion of his own, or of his parents, to visit the place, except for his own

amusement. The company is not liable under such circumstances in the absence of wanton and reckless conduct on its part. (*Hargreaves v. Deacon*, 25 Mich., 1; *Brown v. European & N. A. R. Co.*, 58 Me., 384; *Gillespie v. McGowan*, 100 Pa. St., 144; *Baltimore & O. R. Co. v. Schwindling*, 101 Pa. St., 258; *Nolan v. New York, N. H. & H. R. Co.*, 53 Conn., 461; *Frost v. Eastern Railroad*, 64 N. H., 220; *Clark v. Manchester*, 62 N. H., 577; *State v. Manchester & L. R.*, 52 N. H., 528; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Severy v. Nickerson*, 120 Mass., 306; *Morgan v. Hollowell*, 57 Me., 375; *Pierce v. Whitcomb*, 48 Vt., 127; *McAlpin v. Powell*, 70 N. Y., 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill., 76; *Gavin v. City of Chicago*, 97 Ill., 66; *Wood v. Independent S. D. of Mitchell*, 44 Ia., 27; *Gramlich v. Wurst*, 86 Pa. St., 74; *Cauley v. Pittsburgh, C. & St. R. Co.*, 95 Pa. St., 398; *Mangan v. Atterton*, 1 Ex. L. R. [Eng.], 239\*; *Knight v. Abert*, 6 Pa. St., 472; *Savannah & W. R. Co. v. Meadows*, 10 So. Rep. [Ala.], 141; *Woodruff v. Northern P. R. Co.*, 47 Fed. Rep., 689; 1 Thompson, Negligence, 448; *Saldana v. Galveston, H. & S. A. R. Co.*, 43 Fed. Rep., 862; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Carrico v. West Virginia C. & P. R. Co.*, 14 S. E. Rep. [W. Va.], 12; *Spicer v. Chesapeake & O. R. Co.*, 45 Am. & Eng. R. Cases [W. Va.], 28; *Blight v. Camden & A. R. Co.*, 21 Atl. Rep. [Pa.], 995; *Dlauhi v. St. Louis, I. M. & S. R. Co.*, 16 S. W. Rep. [Mo.], 281; *Hargreaves v. Deacon*, 25 Mich., 5; *Ross v. Texas & P. R. Co.*, 44 Fed. Rep., 44; *Woodruff v. Northern P. R. Co.*, 47 Fed. Rep., 689; *Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. Rep. [Ind.], 70; *Tennis v. Interstate Consolidated R. T. R. Co.*, 25 Pac. Rep. [Kan.], 876; *Toomey v. Southern P. R. Co.*, 24 Pac. Rep. [Cal.], 1074; *Masser v. Chicago, R. I. & P. R. Co.*, 27 N. W. Rep. [Ia.], 776; *Bouwmeester v. Grand Rapids & I. R. Co.*, 34 N. W. Rep. [Mich.], 414; *Scheffler v. Minneapolis & St. L. R. Co.*, 21 N. W. Rep. [Minn.], 711; *Philadelphia*

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& R. R. Co. v. Hummell, 44 Pa. St., 378; *Mason v. Missouri P. R. Co.*, 27 Kan., 83.)

*Henry Nunn and Thummel & Platt, contra:*

A child is held to no greater care than is usually possessed by children of the same age. (Beach, Contributory Negligence, sec. 46; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; Whitaker's Smith on Negligence, sec. 411; *Washington & G. R. Co. v. Gladman*, 15 Wall. [U. S.], 401; *Baltimore & O. R. Co. v. State*, 30 Md., 47; 2 Thompson, Negligence, p. 1140; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis., 613; *McGovern v. New York C. & H. R. R. Co.*, 67 N. Y., 417; *City of Chicago v. Hesing*, 83 Ill., 205; *Ostertag v. Pacific R. Co.*, 64 Mo., 421, and cases cited.)

When the statute imposes upon all railroad companies of this state the duty of erecting and maintaining fences on both sides of their roads, and they fail to do this, they owe a greater degree of carefulness and watchfulness to the general public than if they had complied with the law; and when they run their trains through the country without fencing, they do so at their own peril. (*Schmidt v. Milwaukee & St. P. R. Co.*, 23 Wis., 186; *Blair v. Milwaukee & Prairie Du Chien R. Co.*, 20 Wis., 254\*; *Singleton v. Eastern Counties R. Co.*, 97 Eng. Com. L., 287.)

The evidence shows the track to have been perfectly clear and unobstructed for nearly half a mile, and that the smallest object of a similar color to the child's clothes could be readily seen for over twelve hundred feet by a person standing on the track. The testimony of the engineer is that he did not see the child until within thirty-five feet of him. It is the duty of an engineer to keep a lookout. Not to discover the child under such circumstances is negligence, and that negligence is the proximate cause of the injury, whilst the negligence of the child in going on the track is only a remote cause. Under his own evidence

the engineer was running his train in a wanton and reckless manner. (*Houston & T. C. R. Co. v. Sympkins*, 54 Tex., 615; *Baltimore & O. R. Co. v. State*, 33 Md., 554; *Brandon v. Gulf City Cotton Press & Mfg. Co.*, 51 Tex., 121; *Meeks v. Southern P. R. Co.*, 56 Cal., 513; *Ostertag v. Pacific R. Co.*, 64 Mo., 425; *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo., 543; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo., 475; *Isbell v. New York & N. H. R. Co.*, 27 Conn., 404; *Deans v. Wilmington & W. R. Co.*, 12 S. E. Rep. [N. Car.], 77; *Wilson v. Norfolk & S. R. Co.*, 90 N. Car., 69.)

RAGAN, C.

On July 12, 1888, Samuel Grablin, a boy about nine years old, while trespassing on the track of the Chicago, Burlington & Quincy Railroad Company—hereinafter called the "railroad company"—was struck and killed by engine of said railroad company.

This is a suit for damages brought against the railroad company by the boy's administrator. There was a verdict and judgment for the administrator, and the railroad company prosecutes error.

The averments of negligence in the petition are as follows: That plaintiff is the father of the deceased, and at the time of his death lived on a farm near the railroad company's track; that no part of the line of road at the time of the accident was fenced; that the deceased was about nine years of age, and was sent by his father to look after some stock, shortly before he was killed; that the train causing the accident to the deceased consisted of a locomotive and some freight cars, and that said train was not equipped with air-brakes; that the train was an irregular one and out of its usual time, and was running at a great rate of speed, and omitted to give any signal, by bell or whistle, of its approach, and was not on the time of any trains passing at that point, and was so negligently and

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carelessly run without air-brakes, and without proper care, and without proper signal or alarm of its approach, by reason whereof the deceased was unaware of its approach, etc. There are here, then, pleaded as negligence which caused or contributed to the casualty: (a) the train was not equipped with air-brakes; (b) the train was not on schedule time; (c) the train was run with great speed; (d) on signal by bell or whistle was given of its approach; and (e) that the railroad track was not fenced.

The answer of the railroad company was a general denial of the averments of the petition, and a plea of contributory negligence on the part of the deceased.

On the trial the administrator was permitted, against the objection and exception of the railroad company, to prove by several witnesses, and certain facts and circumstances, that if the engineer in charge of the locomotive had been observing a proper and careful lookout ahead he could have seen the boy in time to have brought the train to a stop before it reached the point where the boy was; or, stated differently, the administrator was permitted to introduce evidence showing a ground of negligence not alleged in the petition as causing or contributing to the accident. This ruling of the trial court is assigned as error. The rule everywhere is that the pleadings and proof must agree. This action was for damages alleged to have been caused by the negligent acts and omissions of the railroad company. The neglect or failure of the engineer to keep a proper lookout ahead is not alleged in the petition as one of these acts or omissions of negligence. Pleadings should be liberally and fairly construed, but such a construction of this petition would not advise the railroad company that on the trial it would have to meet this ground of negligence. No such ground of negligence was alleged in the petition, nor fairly inferable from the language thereof. The allegations in the petition that the train "was so negligently and carelessly run without air-brakes, and without

proper care, and without proper signal or alarm of its approach," by every fair construction of the language, had reference to the running of the train without air-brakes, without giving the signal of its approach by bell or whistle, and by running it at a great rate of speed and out of schedule time. The admission then of the evidence tending to show that the engineer could, by the exercise of a careful and vigilant lookout, have seen the boy in time to have saved him, was error.

It remains to be ascertained whether the admission of this evidence was prejudicial to the railroad company as well as erroneous. The undisputed evidence in the record is that the deceased, at the time he was struck by the engine, was a trespasser on the railroad company's track; that he was not on or nearer than 200 feet of any public or private crossing; that the engine was within thirty-five or forty feet of the boy when he was first seen by the engineer; that the boy was then lying on the track between the rails; that the servants of the railroad company, after their discovery of the boy, made every reasonable and proper effort to stop the train and prevent the accident; that the railroad company's track was not fenced; and that the engine and tender were equipped with an air-brake, but the other cars in the train were not. There was evidence also that the boy had been wallowing in a pool of water in a "borrow-pit" near the track, and had probably lain down in the sun on the track to dry himself and fallen asleep; that the speed of the train was seventeen to thirty-five miles an hour; that the boy when struck was at a point about 700 feet east of a private crossing and 1,200 feet east of a public crossing; that the train, until within 300 feet of the boy, was, for some distance, running on a curved track; that the accident occurred about 5 o'clock P. M. on a bright, sunny day; and that the boy had been sent out by his father that afternoon to look for some stock. It is the duty of railroad companies to signal the approach of their trains to cross-

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ings by bell or whistle, and their failure to do so is negligence for which, in case of injury, they will be responsible. But as the boy was not on or near a crossing or attempting or about to use a crossing when struck, and the train was too far away from the nearest crossing to render a signal of its approach availing, the rule stated above has no application to this particular case. If this verdict rested alone on the alleged negligence of the railroad company in not giving signals for the crossings, it could not stand.

The fact, if it was a fact, that the train was not on schedule time, of itself was not a statement of any negligence, and there is nothing in the record tending to show that the unfortunate casualty was caused or contributed to by that circumstance. This verdict does not depend on that fact in any degree for its support.

It is doubtless the duty of railroad companies to adopt, apply, and use the latest and best tried and proved machinery and appliances in the operation of their roads and for the management and control of their trains and engines. It is a duty they owe especially to their patrons and to the general public, and results from the nature of the business for which they exist and in which they are engaged, viz., the carrying of freight and passengers. The air-brake is among the modern tried and proved appliances that have become a necessity in the operation and management of railroad engines and trains; and the neglect of a railroad company to keep its trains equipped with such brake is doubtless negligence for which, in case of injury resulting therefrom, it would be liable. But in the case at bar the evidence—and all the evidence—shows that the boy, when first seen by the engineer, was only thirty-five or forty feet away. No train running seventeen to thirty-five miles an hour, if fully equipped with an air-brake, could have been stopped in that distance. Unless, then, the speed of the train was negligence, the default of the railroad

company in not equipping the entire train with air-brakes in no manner contributed to this boy's death. We are not prepared to say that ordinarily any rate of speed of a train, however high, outside of the limits of cities, towns, and villages is of itself negligence. The verdict in this case does not rest on the alleged negligence of the railroad company in not equipping its train with air-brakes, nor running it at a high rate of speed, nor on both together.

By the statutes of this state railroad companies are required to fence their tracks, and while the main objects of this law are to protect stock running at large and increase the safety of passengers on railway trains, yet the fencing of their tracks by railroad companies is a positive duty enjoined upon them by law. It is in the nature of a police regulation, and their failure to obey the statute is negligence. In the case at bar the administrator, to recover by reason of the failure of the railroad company to erect fences, must have proved that his intestate's death was caused by such negligent omission of the railroad company. The administrator, on the trial, offered to prove the failure of the railroad company to fence its tracks as required by the statute, and the trial court refused to admit the evidence. The evidence was competent and should have been admitted.

The verdict in this case rests almost entirely upon the evidence that the engineer, had he been keeping a proper and vigilant lookout ahead, could have seen the boy in time to have saved him. The admission of the evidence to prove such negligence was, therefore, prejudicial error.

We might close this opinion here, but as the case must be tried again we deem it best to notice some other points.

Exception is taken by the plaintiff in error to the giving by the trial court of an instruction as follows: "You are instructed that if you believe from the evidence that the deceased, Samuel Grablin, at the time he was killed was about eight years of age, and that he went upon the

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track of the defendant company, and that the engineer running or having in charge the engine, through the want of ordinary or reasonable care, skill, or attention, ran the engine against Samuel Grablin and killed him, in the manner and form as alleged in plaintiff's petition, then the plaintiff has a right to recover in this case; provided, you further believe from the evidence that Samuel Grablin, by reason of his being so young, was incapable of exercising any more care or discretion than he did show or exercise at the time of the accident." This instruction left to the jury the question whether or not the boy, his age and discretion considered, was guilty of contributory negligence in trespassing on the railroad track.

In *Huff v. Ames*, 16 Neb., 139, this court thus announces the rule in such cases: "In an action by an infant for damages, caused by the alleged negligence of the defendant, where it is claimed by the defense that the injury resulted from contributory negligence of the infant plaintiff, it is proper for the court to instruct the jury that in determining whether or not the plaintiff was guilty of negligence they should take into consideration his age and discretion in determining that fact, and that the same degree of caution and care should not be required of him as in case of an adult under similar circumstances." This is undoubtedly the correct rule. It would be manifestly unreasonable, if not inhuman, to judge the conduct of an infant of tender years by the same standard which governs the conduct of an adult. All that the law requires of such an infant is that he exercise that care, discretion, and prudence which may reasonably be expected from children of like age. (Beach, *Contributory Neg.*, sec. 46; Sherman & Redfield, *Neg.*, sec. 73; Whittaker, *Neg.*, p. 411; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657.) In the abstract the instruction was correct.

The trial court refused to instruct the jury as follows: "You are instructed that although you may find from the

evidence that the engineer was negligent in not seeing the boy upon the track in time to avoid the injury to him, or that the train was not properly equipped, still, if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were willfully or recklessly negligent after the boy was discovered, or that the engineer willfully avoided seeing the boy on the track sooner than he did see him." This refusal of the court is here assigned as error by the railroad company. This instruction is based on the doctrine that as the boy was a trespasser on the railroad company's track, the engineer's failure to see him in time to avoid the accident was not actionable negligence, even though the engineer could have seen him had he been exercising a vigilant lookout; that a railroad engineer is under no obligation to keep a lookout for intruders on the track; and that the railroad company can only be held liable for the boy's death if its servants were guilty of negligence towards him after they discovered him on the track. This doctrine has found advocates in some courts of eminent respectability. But we cannot adopt it. It is the duty of an engineer in charge of a locomotive and train to exercise a careful and vigilant lookout ahead for any and all kinds of obstructions on the track. This duty the corporation he serves owes both to passengers on the train he is hauling and to the public. True, the engineer is not enjoined with the duty of keeping an especial lookout for sleeping children on the track; nor is he ordinarily enjoined with the duty of keeping such lookout for a burning culvert, because it is not likely to be on fire, but if it is, and he fails to see it by reason of neglecting to exercise a vigilant lookout, he is guilty of negligence. And in the case at bar, if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to

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save him, then his neglect to exercise such careful and vigilant lookout was negligence.

*Virginia M. R. Co. v. White's Administrator*, 34 Am. & Eng. R. Cases [Va.], 22, was a suit for damages for killing an adult trespasser. The trial court refused to instruct the jury as follows: "If the jury believe from the evidence that plaintiff's intestate was killed by the engine of the defendant company while he was walking on one of the tracks of the defendant in its yards, \* \* \* the plaintiff cannot recover for such injury unless he proves to the satisfaction of the jury that the engineer, \* \* \* after he discovered the danger in which the deceased was placed, could, by the use of ordinary care, have prevented the accident." On appeal the supreme court of Virginia say: "This instruction was properly refused. Its vice is that it ignores the duty of the engineer \* \* \* to have exercised ordinary care and diligence in keeping a lookout to avoid injuries to the deceased. \* \* \* It was the duty of the engineer to use ordinary care not only after discovering the dangerous position of the deceased, but in keeping a lookout to warn him of approaching danger." To the same effect see *Guenther v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 47; *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cases [Mo.], 81.

In *Texas & P. R. Co. v. O'Donnell*, 58 Tex., 27, it is said: "A railroad company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employes of the company used ordinary care, in keeping an outlook." To the same effect see *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo., 475; *Atchison, T. & S. F. R. Co. v. Smith*, 28 Kan., 541; *Keyser v. Chicago & G. T. R. Co.*, 66 Mich., 390; *Meeks v. Southern P. R. Co.*, 56 Cal., 513; *Frick v. St. Louis, K. C. & N. R. Co.*, 75 Mo., 542.)

The refusal of the court to give the instruction referred to was correct. For the error committed in the admission

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of testimony, as stated above, the judgment of the district court is reversed, the cause is remanded, with instructions to the court below to grant the plaintiff in error a new trial, and to permit the plaintiff below, if he so desires, to amend his petition.

REVERSED AND REMANDED.

MAXWELL, C. J., dissenting.\*

I am unable to give my assent to the opinion in this case for the following reasons:

The syllabus does not present the point actually decided. In the petition, as set out in the opinion, it is alleged that the train "was so negligently and carelessly run without air-brakes, and without proper care, and without proper signals or alarm of its approach, by reason whereof the deceased was unaware of its approach." The evidence objected to as set forth in the opinion was "that if the engineer in charge of the locomotive had been observing a proper and careful lookout ahead he could have seen the boy in time to have brought the train to a stop before it reached the point where the boy was," and it was held in the above opinion that this proof was not admissible under the pleadings, and the case on that ground reversed. To this I cannot give my assent. The allegation that the train was run without proper care at the place where the death occurred would admit any evidence tending to show negligence or want of due care. Negligence is the ultimate fact to be pleaded, and it forms part of the act from which injury arises. An allegation of negligence or carelessness, as applied to the conduct of a party, is not a mere conclusion of law, but a statement of an ultimate fact. (*Rolseth v. Smith*, 35 N. W. Rep. [Minn.], 565; *Clark v. Chicago & W. M. R. Co.*, 28 N. W. Rep. [Mich.],

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\* The opinion in this case at the time it was filed was concurred in by all the members of the court. Subsequently the chief justice furnished the reporter the above dissenting opinion.

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914; Maxw. Code Pl., 252, and cases cited.) Any proof tending to show a want of due and proper care is admissible under the allegations of the petition, and the court cannot, without a forced construction, limit these words to the want of air-brakes or the failure to blow the whistle or ring the bell. The charge is general that the train was run "without proper care." The language evidently refers to the running of the train. Under the Code, language is to be given its ordinary and natural meaning, the same as it would have in a contract or other instrument. In my view great injustice is done by the reversal upon the ground stated. The judgment should be affirmed.

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CHARITY SMITH V. GILBERT M. HITCHCOCK.

FILED OCTOBER 18, 1893. No. 5338.

1. **Ejectment: TITLE BY PRESCRIPTION: NOTICE TO OWNER OF LEGAL TITLE: PROOF.** A plaintiff in ejectment, claiming title to the lands sued for by reason of ten years' adverse possession thereof, to prevail, must prove a continuous possession of said property under a claim of ownership in himself, and that such possession was actual, visible, notorious, exclusive, and adverse to the owner of the legal title.
2. ———: **TO CONSTITUTE AN ADVERSE POSSESSION** of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor.
3. ———: **CONCURRENT POSSESSION: PERMISSIVE ENTRY UPON PREMISES.** Where the owner of the legal title to real estate occupies the same concurrently with one who entered by his permission without color of title, such possession of the owner negatives any presumption that the other occupied adversely to him.
4. ———: **ADVERSE POSSESSION: NOTICE: ENTRY BY PERMISSION OF LEGAL OWNER.** Where possession of real estate is the result of an entry upon the premises by permission of the legal

38	104
38	112
38	104
46	221
38	104
48	511
38	104
51	360
38	104
60	732
60	741
38	104
61	92
38	104
62	168
62	563

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owner, such possession will not become adverse until some act is committed by the occupant rendering it so, and notice thereof is brought home to the owner of the legal title.

5. **Trial: RULING ON ADMISSIBILITY OF EVIDENCE: REVIEW.** In order to predicate error upon the sustaining by the trial court of an objection to a question propounded to a party's own witness, the party must make an offer to prove the fact sought to be elicited by the question. *Masters v. Marsh*, 19 Neb., 458, followed.
6. **New Trial: NEWLY DISCOVERED EVIDENCE.** To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative. It must further appear that the applicant for the new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. *Fitzgerald v. Brandt*, 36 Neb., 683, followed.
7. ———: ———. A new trial should not be granted on the grounds of newly discovered evidence, when such testimony would not change the result of the first trial. *Keiser v. Baker*, 29 Neb., 92, followed.

ERROR from the district court of Douglas county.  
Tried below before DOANE, J.

*David Van Etten*, for plaintiff in error:

The word "hostile," when applied to the possession of an occupant of real estate holding adversely, is not to be construed as showing ill will, or that he is an enemy of the person holding the legal title, but means an occupant who holds and is in possession as owner, and, therefore, against all other claimants of the land. (*Ballard v. Hansen*, 51 N. W. Rep. [Neb.], 295.)

A party in possession and cultivating a tract of land will be presumed to have some interest therein. Such notice may be as effectually communicated by the open and notorious possession of the occupant as by information personally communicated. (*Filley v. Duncan*, 1 Neb., 134; *Jones v. Johnson Harvester Co.*, 8 Neb., 446.)

The entering upon land and making improvements thereon is one of the presumptive evidences evincive of

intention to assert ownership. So is possession made out by placing on the premises buildings. (*Horbach v. Miller*, 4 Neb., 47; *Gregory v. Langdon*, 11 Neb., 169.)

Possession is sufficient. (*Keith v. Tilford*, 12 Neb., 272; *Trussel v. Lewis*, 13 Neb., 415; *Yetzer v. Thoman*, 17 O. St., 130.)

Adverse possession for ten years will vest a valid title in the occupant. Color of title is not essential to adverse possession. Claim of title need not be valid. (*Galling v. Lane*, 17 Neb., 77; *Haywood v. Thomas*, 17 Neb., 237; *Warren v. Bowdran*, 31 N. E. Rep. [Mass.], 300.)

The law presumes he has title who has possession. (*Stettinische v. Lamb*, 18 Neb., 619; *Baldwin v. City of Buffalo*, 35 N. Y., 375.)

Equity protects a parol gift of land occupied by donee. (*Dawson v. McFaddin*, 22 Neb., 737; *McKesson v. Hawley*, 22 Neb., 693.)

Adverse possession by mistake will work a disseisin, and possessor's title will be perfect. (*Tex v. Pflug*, 24 Neb., 667; *Levey v. Yerga*, 25 Neb., 764; *Obernalle v. Edgar*, 28 Neb., 70.)

Where limitations by adverse possession have begun to run against father in his lifetime, where title is claimed through him, his death and the minority of the children will not arrest it, and if it has run the full statutory period, such possession from the beginning bars recovery. (*Hardy v. Riddle*, 24 Neb., 670.)

*Chas. E. Clapp, contra:*

Possession which is permissive and entirely consistent with the title of another cannot silently bar that title. (*Kirk v. Smith*, 9 Wheat. [Pa.], 288\*.)

RAGAN, C.

This is a suit in ejectment brought on November 9, 1889, in the district court of Douglas county by Mrs. Charity

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Smith v. Hitchcock.

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Smith against Gilbert M. Hitchcock, for a part of lot 1, in Capitol Addition to the city of Omaha. The case was tried to a jury, who, under instructions of the court, rendered a verdict for Hitchcock, and Mrs. Smith brings the case here for review.

Mrs. Smith has no paper title of any kind for any part of the property. Her claim is based wholly on possession. The record shows that on and prior to 1869 this lot, No. 1, being 668 feet in length north and south, and 218 feet in width east and west, was owned by Mrs. Annie M. Hitchcock. She died in 1887, and the lot by her will passed to her husband, the late Senator Hitchcock. He died in 1881, and the lot descended to his son, the defendant in error. About 1870, by permission of Mrs. Hitchcock and her husband, Mrs. Smith moved a small cottage she owned upon this lot 1, near the east line thereof, and lived in this cottage at that place until 1880. Mrs. Smith did laundry work from time to time during these years for the Hitchcock family and others. She also planted part of the ground near her cottage to a garden. During all these years the Hitchcock family, consisting of Mrs. Hitchcock, her husband, and the defendant in error, and others, lived upon the lot; had on it their barn, horses, cattle, and garden, and exercised exclusive ownership and control of the whole lot. During all this time it was all under one inclosure, built and maintained by the Hitchcocks; and that part occupied by Mrs. Smith's cottage was in no other manner, than by the cottage itself, separated or severed from the remainder of the lot. Mrs. Smith, during this period, by the permission and consent of Mrs. Hitchcock and her husband, and as a kind of nonrentpaying tenant at will, or sufferance, also occupied her cottage on the lot. She paid no taxes. She exercised no act of ownership over the lot or any definite portion of it. Thus matters continued until 1880, when Mrs. Smith, by the permission of Senator Hitchcock, who then owned the title to the lot as devisee

of his deceased wife, and who still continued to occupy the lot with his family, removed her cottage to a point nearer the west line of said lot and some 250 feet southwest of its original location. This is the present location of the cottage. The usual occupation and control of the lot by the Hitchcocks continued as before this removal, and Mrs. Smith continued to live on uninterruptedly in her cottage. The senator died in 1881, and the defendant in error became the owner of the lot, and has since continued to reside upon it in the family homestead. In 1883 defendant in error erected three houses on a portion of the lot now claimed by Mrs. Smith, which houses have since been occupied by tenants of the defendant in error.

In 1886 Douglas street, 66 feet wide, was extended west across the entire lot, leaving the first location of Mrs. Smith's cottage north of said street. After the extension of Douglas street, the defendant in error built fences on both the north and south lines of the street, thus dividing said lot into two separate inclosed portions; one being that part of said lot lying north of said Douglas street, and on which Mrs. Smith's cottage was first located, and on which the Hitchcock homestead and the three tenant houses aforesaid are situate; the other portion being all of said lot 1 south of Douglas street, and on which portion is now Mrs. Smith's cottage. No claim for damages was made by Mrs. Smith at the time of the extension of this Douglas street, nor did she assert or claim any ownership over the land taken for such extension, though now she claims that the land used for such extension was her property. She asserted no claim of ownership or title to any of the property at the time of the building of the tenement houses by the defendant in error.

Mrs. Smith, to recover here, must prove either a paper title or prove ten years' open, notorious, exclusive, and adverse possession. She has no paper title. She occupied, by living in her cottage, a part of this lot openly and no-

toriously for ten years, but no specific or definite part of the lot other than the *situs* of the cottage itself. Her possession of the lot was also concurrent with that of the owner of the legal title. It was a mixed possession; not an exclusive one. The defendant in error, the holder of the legal title, has never been out of possession of the property claimed by Mrs. Smith, and this negatives any legal presumption that her possession was adverse to his title or possession. (*Green v. Lister*, 12 U. S., 229; *Proprietors Kennebeck Purchase v. Springer*, 4 Mass., 415.)

But as a matter of fact or law, was Mrs. Smith's possession of this property adverse? She entered by permission of the owner, and in 1880, by his permission, moved her cottage to another part of the same premises, not involved in this case. To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title. (*French v. Pearce*, 8 Conn., 439; *Newell, Ejectment*, p. 697, sec. 1.) There is no evidence in the record that establishes, or tends to establish, the fact that Mrs. Smith's possession was an adverse one; nor that she entered into possession of these premises with the intention of claiming them as her own, or that she ever held after her entry in hostility to the defendant in error. Mrs. Smith's entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner. (*Harvey v. Tyler*, 2 Wall. [U. S.], 328; *Allen v. Allen*, 58 Wis., 202-209; *Perkins v. Nugent*, 45 Mich., 156; *Davenport v. Sebring*, 52 Ia., 364; *Pease v. Lawson*, 33 Mo., 35; *Smith v. Stevens*, 82 Ill., 554; *Angell, Limitations*, sec. 354.) The court did not err in instructing the jury to find for the defendant.

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Complaint is made because of the refusal of the trial court to permit witnesses of the plaintiff in error to answer certain questions propounded to them on the trial. No tender or offer of the evidence sought to be elicited by these questions was made, and these assignments cannot now be considered. (*Masters v. Marsh*, 19 Neb., 458; *Connelly v. Edgerton*, 22 Neb., 82; *Yates v. Kinney*, 25 Neb., 120; *Burns v. City of Fairmont*, 28 Neb., 866.)

Another error assigned is the overruling of the motion for a new trial on the ground of newly discovered evidence. To entitle the plaintiff to a new trial on account of newly discovered evidence, it is not enough that the evidence is material. It must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. (*Fitzgerald v. Brandt*, 36 Neb., 683.) The proof fails to disclose such diligence on the part of the plaintiff in error as entitled her to a new trial on the ground of newly discovered evidence; but if it did, and the evidence now claimed to be newly discovered was put into the record, it would not change the result. A new trial should not be granted on account of newly discovered evidence when such evidence, if admitted, could not change the result of the first trial. (*Keiser v. Decker*, 29 Neb., 92.)

The judgment of the district court is

**AFFIRMED.**

RYAN, C., concurs.

IRVINE, C., having been of counsel in the case below, took no part in the consideration or decision here.

CHARITY SMITH, APPELLANT, V. DAVID T. MOUNT ET  
AL., APPELLEES.

FILED OCTOBER 18, 1893. No. 5022.

**Ejectment: TITLE BY PRESCRIPTION: PERMISSIVE OCCUPANCY.**

The decree in this case is affirmed, the facts and law being essentially the same as in the case of *Smith v. Hitchcock*, 38 Neb., 104, decided at the present term.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*David Van Etten and Joseph T. Patch*, for appellant.

*Montgomery, Charlton & Hall*, contra.

RAGAN, C.

This is a suit in equity brought in the district court of Douglas county by Charity Smith against David T. Mount, in which she alleges that she is the owner and in possession of a part of lot 1 in Capitol Addition to the city of Omaha, and has been for about twenty-two years; that Mount had interfered, and was threatening to interfere, with her possession. She has no paper title to the property, but bases her title on adverse possession. The prayer of the petition is for an injunction restraining Mount from interfering with her possession, and to quiet and confirm the title to the property in her.

The answer of Mount was a general denial, and setting out his possession of the real estate described in plaintiff's petition; that he had been in possession of it since 1886, and had erected a brick residence thereon in which he was living; that he derived his title from one Gilbert M. Hitchcock, who derived his title from the late Senator Hitchcock, and his title came from his wife, Annie M. Hitchcock, who

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owned the land as far back as 1869. The prayer of Mount's answer was that the title to the real estate might be quieted and confirmed in him, and that the petition of Mrs. Smith might be dismissed.

There was a trial to the court, who rendered a decree dismissing the plaintiff's suit, and quieting the title to the property in controversy in Mount, and Mrs. Smith appeals to this court.

All the essential points in this case, and the law applicable thereto, are stated in the case of *Smith v. Hitchcock*, 38 Neb., 104, decided at this term of court, and following the conclusion reached in that case, the decree of the district court in the case at bar is

AFFIRMED.

RYAN, C., concurs.

IRVINE, C., having been of counsel in the case of *Smith v. Hitchcock*, 38 Neb., 104, took no part in the consideration and decision of this case.

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**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY  
V. NIELS ANDERSON.**

FILED OCTOBER 18, 1893. No. 4803.

1. **Review: JOURNAL ENTRIES: REMEDY FOR DEFECT: TRANSCRIPTS.** The entries upon the journal of the district court are conclusive evidence of its proceedings. If the clerk has not made such entries in conformity with the facts or the rulings of the judge, the remedy is by a correction of the journal by order of the district court. This court will not substitute a paper certified to be a memorandum of journal entry prepared by the judge for the journal entry itself, as it appears in the transcript filed in this court and certified to be a true transcript of the record.
2. **Trial: INSTRUCTIONS: REVIEW.** An instruction is erroneous which assumes a fact as established which is material to the case and as to the existence of which the evidence is conflicting.

38	112
51	789
64	58

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3. ———: ———: ———. The giving of instructions which are vague and conflicting, and which probably had the effect of confusing and misleading the jury, is erroneous, and the fact that the general tenor of the instructions is more favorable to the unsuccessful party than to the successful one does not cure the error.

ERROR from the district court of Custer county. Tried below before GASLIN, J.

The opinion contains a statement of the facts.

*Marquett & Deweese*, for plaintiff in error:

Where several persons are employed in the same general service, and one is injured by the carelessness of another, the employer is not responsible, though the negligent servant is a superior in grade of employment to the one injured (Deering, Negligence, sec. 204), and this rule includes foreman, superintendent, and boss. (*McLean v. Blue Point Gravel Mining Co.*, 51 Cal., 255; *Chicago & T. R. Co. v. Simmons*, 11 Ill. App., 147; *Floyd v. Sugden*, 134 Mass., 563; *Malone v. Hathaway*, 64 N. Y., 5; *Keystone Bridge Co. v. Newberry*, 96 Pa. St., 246; *Hoth v. Peters*, 55 Wis., 405; *Ell v. Northern P. R. Co.*, 48 N. W. Rep. [N. Dak.], 222.)

An instruction assuming as a material fact that which is not established by the evidence is erroneous. (*Union P. R. Co. v. Ogilvy*, 18 Neb., 643; *Housel v. Thrall*, 18 Neb., 487; *Smith v. Evans*, 13 Neb., 316; *Woodruff v. White*, 25 Neb., 749; *Herron v. Cole*, 25 Neb., 704.)

Conflicting and misleading instructions are erroneous, and the error committed in giving such instructions is not cured by giving others which state the law correctly. (*Vanslyok v. Mills*, 34 Ia., 375; *Davis v. Strohm*, 17 Ia., 421; *Toledo, W. & W. R. Co. v. Morgan*, 72 Ill., 155; *Steinmeyer v. People*, 95 Ill., 383; *Fitzgerald v. Meyer*, 25 Neb., 82; *Wasson v. Palmer*, 13 Neb., 376; *McPherson v. Wiswell*, 19 Neb., 12, 126.)

*J. S. Kirkpatrick*, also for plaintiff in error.

*R. A. Moore* and *Henry M. Kidder*, contra:

The company is liable for the acts of the section boss. (*Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254.)

IRVINE, C.

The defendant in error was a section man in the employ of the plaintiff in error, and on the evening of November 21, 1890, was engaged, together with one Bingham, the "section boss," and one Dunlap, a road master, in loading three railroad rails upon a flat car at the station of Mason, in Custer county. While loading the rails, one of them, while being lifted upon the car, fell back in some manner and struck the hand of defendant in error, injuring it quite severely. This action was begun by defendant in error to recover damages for the injuries so sustained, and resulted in a verdict and judgment in his favor for \$1,490.

The facts are, for the most part, undisputed. Bingham was the "section boss," with authority to employ and discharge section men, and the plaintiff below had, in fact, been employed by him and was under his direction and subject to his orders. Dunlap was the road master, but his authority and powers do not appear from the evidence. During the day three rails had been placed upon the platform in front of the station for the purpose of loading them upon a freight train due in the course of the afternoon. The train was late, and did not arrive until after dark. Anderson, by Bingham's orders, had remained at the station after the usual working hours had passed, for the purpose of assisting in loading the rails. The car upon which the rails were to be loaded was next to the caboose at the west end of the train. It stopped opposite to the platform upon which, at some point not clearly shown, but

near the car, was placed a brakeman's lantern. There is evidence tending to show that there was a light in the window of the station at some distance from the car. A stake was placed in a socket near the east end of the flat car. Anderson, Bingham, and Dunlap proceeded to load the rails by first raising the east end of each upon the car, and then shoving the rail so that the end would be guarded by the stake. They would then go to the west end of the rail, lift up that end, and upon a given signal, throw that end of the rail upon the car. Dunlap directed that the rails should be loaded. Bingham had supervision of the process of loading. It seems that two rails had been loaded in this manner, the east end of the third rail placed upon the car and shoved past the stake, and the three men proceeded to raise the west end. In doing so Anderson stood farthest east, and both Bingham and Dunlap were nearer the west end and the caboose. The rail was raised, the signal given, and the rail thrown toward the car. In some manner it rebounded, striking Anderson's hand. Plaintiff's theory was that the rail had not been pushed far enough so as to permit the west end to pass upon the flat car without striking the caboose; that it was Bingham's duty to see that it was in a safe position to throw; that he was so situated that he could see whether or not the rail, when thrown, would pass free of the caboose; that he failed to do so and that the rail when thrown did strike the caboose, and the accident was thereby caused. The plaintiff swears that the west end of the rail did strike the caboose, but in cross-examination it is shown that his only reason for saying so is that it is only upon that theory he can account for the accident, and that the statement was not based upon actual observation. There is testimony on the part of the railroad company in regard to the length of the car, the position of the stake and the rail, and the length of the rail itself, which, if believed by the jury, would render it impossible for them to find that the rail did strike the caboose.

In this state of the evidence the court gave the following instruction :

“If you find from the evidence that, when the plaintiff was loading the iron complained of in the petition, he was acting under the instructions of the section boss or road master, and was directed by him the way in which said iron should be loaded, and after one end had been placed upon the car told him to stop and go to the other end, and if at that time they were *nearer the end of the rail that struck the caboose* or freight train than he was, and had a better opportunity of seeing whether the rail would pass the other car, and instructed him to go from one end to the other and throw it on the car, and if such injury was sustained while following out such instructions of the road master or section boss, the defendant would be liable for the same. Modified as follows : Provided you find the said plaintiff was under the control and absolutely subject to orders of the section boss or road master who was employed by defendant to control the plaintiff while engaged in the work said plaintiff was doing at time he was injured, and you find by acting under said orders said plaintiff was injured by the carelessness and negligence of defendant and its representatives while in charge of the authority placed in him by defendant. You will find for plaintiff if he was in the use of ordinary care when he was injured.”

The object of this instruction seems to have been to give the whole law to the jury upon this theory of the case. It will be observed that in it the court assumes as an established fact that the rail did strike the caboose, the language being : “If at the time they were nearer the end of the rail that struck the caboose or freight train than he was, and had a better opportunity of seeing whether the rail would pass the car.” The word “if” had the effect of submitting to the jury the question of the position of the men and their powers of observation, but did not qualify the clause in regard to the rail striking the caboose, leaving that question

of fact, upon which the evidence was conflicting, as assumed by the court and nowhere by the instructions left to the determination of the jury. The instruction was erroneous in this particular. It was objectionable also as being vague in its expression, and ambiguous. The last sentence, "You will find for the plaintiff if he was in the use of ordinary care when he was injured," standing as it does alone, might lead the jury to infer, in connection with the assumption in regard to the fact of the rail striking the caboose, that the question of plaintiff's contributory negligence was the only one left for their consideration.

It is said by the defendant in error that the general effect and tenor of the instructions were very favorable to the plaintiff in error. This is true, but an erroneous instruction is not cured by giving another stating the law correctly, nor by stating it too strongly for the other party. A review of the instructions discloses a very peculiar state of affairs. Under the rule as laid down in *Chicago, St. P., M. & O. R. Co. v. Lundstrom*, 16 Neb., 254, and *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775, Bingham certainly occupied towards Anderson the relation of a vice-principal. By the first instruction given at the request of the plaintiff that question was left to the jury under the instruction that to hold the defendant responsible the jury must find that the section boss had control of and charge over the men, and authority to employ and discharge men. By the modification of the second instruction the jury was told that the plaintiff must be under the control of, and absolutely subject to the orders of, the section boss or road master.

By the first instruction given by the court of its own motion the jury was told that to sustain the action it must find that plaintiff was acting under proper and legitimate orders of the section boss and road master who were the regularly constituted representative agents of the defendant company, provided they had power to control and direct plaintiff's movements; and later on, in the same in-

struction, that the plaintiff must be absolutely under the direction and control of the boss. Then, at the request of the defendant, the jury was told point blank that the evidence showed Bingham and Dunlap to be fellow-servants; and again, that a section foreman is a fellow-servant where he works with the laborers, and his business was not entirely that of direction and supervision.

It was also urged that the railroad company was negligent in not providing sufficient lights and in not having on hand a sufficient force of men to safely load the rails. By the second and third instructions given by request of the railroad company the jury was told that there could be no recovery upon that ground, because there was no evidence that Anderson made any objection to proceeding with the work under the circumstances; yet by other instructions the jury is told again and again that if the plaintiff was injured while carrying out the orders of his superiors it should find for the plaintiff, provided the injury was caused by negligence of the defendant or defendant's representatives. The rule in regard to negligence was nowhere defined, except by the fifth and sixth instructions given by the court of its own motion. By these instructions the jury was told that it must find for the defendant, if it found that the defendant was in the exercise of ordinary care at the time. Nowhere, except in the absolute instructions, given at the request of the defendant, was the jury limited as to the acts which it might consider as negligent.

Again, the jury was told in the fourth instruction that if it found the injury the result of an accident plaintiff could not recover. The term "accident" was not defined.

We quite agree with the defendant in error, that instructions were given greatly to his prejudice. The trouble is that the verdict was absolutely contrary to such instructions, and taking the whole of the charge, the instructions were so conflicting, so vague, and so confusing that they

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must have embarrassed rather than aided the jury. It would be a travesty upon justice to permit a verdict in favor of either party to stand when based upon such crude and conflicting statements and misstatements of the law.

REVERSED AND REMANDED.

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GEORGE B. HOVLAND V. C. B. BURROWS.

FILED OCTOBER 24, 1893. No. 5096.

**Pleading: ORDER STRIKING OUT PORTION OF DEFENSE.** A defendant has a right to set up his entire defense, and where such defense consists of a series of acts, which together constitute one transaction, a portion of the same cannot be stricken out against his objections.

ERROR from the district court of Madison county.  
Tried below before NORRIS, J.

The court below sustained a motion to strike out, as redundant, scandalous, and irrelevant, certain portions of the answer. The ruling is assigned as error. The answer and motion are set out in the opinion. *Reversed.*

*Allen, Robinson & Reed*, for plaintiff in error:

Fraud may always be alleged where it exists and cannot be proved without being alleged, where it is germane to the issue and forms one of the cardinal facts constituting the defense. (*Tepoel v. Saunders Co. Nat. Bank*, 24 Neb., 816; 8 Am. & Eng. Ency. Law, p. 653.)

While it is competent to strike out redundant, scandalous, or irrelevant matter from a pleading, the party who makes the motion must be prejudiced thereby. (Sec. 125, Code; *Cate v. Gilman*, 41 Ia., 530; *Martin v. Swearengen*, 17 Ia., 346; *Molony v. Davis*, 15 How. Pr. [N. Y.], 261.)

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It was claimed in the court below that the matter stricken out under the first assignment of Burrows' motion was rendered improper because it was alleged that in consideration of the fraud the parties had entered into a new contract which superseded the one induced by the fraud. The motion does not deny that this is proper defensive matter, but assails it as unnecessary to show or establish that defense. These objections are not grounds of a motion to strike. (*Specht v. Spangenberg*, 70 Ia., 488; *Walker v. Pumphrey*, 48 N. W. Rep. [Ia.], 928.)

*Reese & Gilkeson and Wigton & Whitham, contra:*

A settlement by the parties after full knowledge of the alleged fraud is a complete bar to relief on the ground of the fraud. (*Parsons v. Hughes*, 9 Paige Ch. [N. Y.], 591; *O'Dell v. Rogers*, 44 Wis., 136, 181; *Rogers v. Higgins*, 57 Ill., 244, 250; *Adams v. Sage*, 28 N. Y., 103, 109.)

Testimony would, therefore, be inadmissible to impeach the note alleged in the answer to have been given as a renewal of the notes claimed to have been obtained by fraud, because given with a full knowledge of all the facts constituting the alleged fraud. The allegations of fraud were, therefore, wholly unnecessary and redundant, and if allowed to remain would have been highly prejudicial to Burrows. But whether prejudicial or not, as such allegations were not necessary as the foundation of pertinent and proper testimony, they were rightly stricken out. (*Hale v. Wigton*, 20 Neb., 83; *Coquillard v. Hovey*, 23 Neb., 622; *Columbus, H. & G. R. Co. v. Braden*, 11 N. E. Rep. [Ind.], 357; *Davis v. Davis*, 21 N. E. Rep. [Ind.], 1112, 1114; *Petree v. Fielder*, 29 N. E. Rep. [Ind.], 272.)

MAXWELL, C. J.,

This is an action to foreclose a mortgage on real estate. The petition is in the ordinary form. To this petition the defendant filed an answer as follows:

"And now comes the defendant and by way of amended answer to the petition of the plaintiff in this case says:

"1. This defendant admits the making and delivery of the notes and mortgage sued on in this case and the recording of the latter.

"2. That on and prior to the 14th day of July, 1887, the plaintiff was the owner and possessed, at Newman Grove, Nebraska, of a miscellaneous stock of second-hand merchandise, consisting of dry goods, boots, shoes, hats, caps, clothing, notions, groceries, and such other goods and general merchandise as are generally kept for sale and sold in a retail country store, and which was worth at wholesale prices at said time not to exceed the sum of \$2,787, as the said plaintiff then and there well knew. Said stock of merchandise was at said time stored in a store-room, securely boxed and packed, and secure from examination or inspection by this defendant, except a few hundred dollars' worth of the best part thereof, which was displayed on the shelves of said store-room and could be examined. Said stock of merchandise had been traded for by the plaintiff at Rising City, Nebraska, in the month of May, 1887, and at said time a pretended invoice of them had been made at their alleged wholesale value by some one to this defendant unknown, at the instance and request of the plaintiff, which pretended invoice was wholly false, fraudulent, and untrue, and greatly in excess of the actual wholesale value of said merchandise, as the said plaintiff, at the time of the transactions hereinafter stated and alleged, well knew. That on or about the said 14th day of July, 1887, the said plaintiff began negotiating with this defendant for the sale to him of the said stock of merchandise, and then and there, for that purpose and to that end, falsely, fraudulently, and well knowing the same to be untrue, represented and stated to this defendant that said stock of merchandise was a first-class, fresh, A No. 1 stock of merchandise, free in all respects from any defects or impairments; that it had been

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purchased at wholesale less than a year prior to that time and that he, the said plaintiff, would warrant the same in all respects as being a good fresh, A No. 1 stock of merchandise; that all of said merchandise in boxes was as good as that displayed on the shelves, and that the latter was a fair sample of the former, and that he would warrant and guarantee to this defendant the correctness in all respects of said pretended invoice of said stock of merchandise, which said invoice he then exhibited to this defendant, showing said stock of merchandise to be of the wholesale value of \$8,808.84, and stating and representing at the time to this defendant, fraudulently and falsely, and well knowing the same to be false and untrue, for the purpose of inducing this defendant to purchase said stock of merchandise; that said invoice was in all respects true and correct, and genuine, and fairly represented the wholesale value of said stock of merchandise; that at said time that part of said stock of merchandise which was displayed on the shelves of said store building was the best part thereof, and was so displayed by the procurement of the plaintiff to mislead this defendant, and induce him to believe that the part thereof in boxes was of the same quality and value; that relying upon the truthfulness of the said several representations, statements, warranties, and guaranties so made to him as aforesaid by the plaintiff, and believing them to be true, and believing said part of merchandise in boxes was of the same quality and value as that part thereof displayed in the shelves of said store building, this defendant was induced thereby to purchase and did purchase of said plaintiff said stock of merchandise at the agreed sum of \$8,808.84, the sum which the said plaintiff had so falsely and fraudulently represented and stated to this defendant that said stock of merchandise was worth at wholesale value. This defendant paid the plaintiff for said stock of merchandise as follows: 'discount of twenty-five per cent off of said sum pursuant to contract, \$2,202.21; conveyance of real

estate at the agreed sum of \$1,300; and credit for goods previously sold from said stock, \$503; and for the remainder this defendant gave the plaintiff his negotiable promissory note, payable at a future date.' That this defendant would not have purchased of said plaintiff said stock of merchandise, or made said payments, or given said promissory note, but for said false and fraudulent representations, statements, warranties, and guaranties of said plaintiff so made to him, which he relied on and believed to be true at the time. This defendant alleges and charges the fact to be that each and all of said representations, statements, warranties, and guaranties so made to him by plaintiff were, when made, and are now wholly false and untrue and fraudulent, and were known by the plaintiff to be false, fraudulent, and untrue when so made; and they were made by him for the sole purpose of misleading and defrauding this defendant into purchasing said stock of merchandise; and he was thereby induced to make such purchase and payments and give said promissory notes by reason thereof; that in truth and in fact the said stock was not a first-class, fresh, A No. 1 stock of merchandise, and was not free in all respects or in any respect from defects or impairment; but on the contrary the same was rotten, old, shelf-worn, unsalable, and a condemned stock of merchandise and did not have merchantable value to exceed the sum of \$2,787, as the plaintiff then and there well knew; that said stock had been purchased many years prior to the said 14th day of July, 1887, and consisted of condemned, impaired, defective, and unsalable remnants and refuse articles of merchandise, as said plaintiff at the time well knew; that said pretended invoice was not a true, correct, or honest invoice of said stock, or of the wholesale value thereof, and the goods in boxes were not of the quality or value of those displayed on the shelves, but were much inferior and of but little value, all of which was to the plaintiff well known and to this defendant unknown at the time of making said contract of

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purchase; that in drawing the notes given to secure the deferred payments of said stock of merchandise the said plaintiff designedly and fraudulently neglected to deduct therefrom the said twenty-five per cent discount as aforesaid and fraudulently and designedly included the same in said notes; that the sole and only consideration of the note and mortgage sued on in this case are said notes above mentioned, of which the note in suit is a renewal, and given under the circumstances and for the purpose hereinafter stated; that shortly after the purchase of said stock of merchandise of the plaintiff, this defendant discovered the said fraud that had been practiced on him by the plaintiff and annulled the said contract of purchase of said stock of merchandise, and he and the said plaintiff then and there, and in consideration thereof, made and entered into a new and different contract with reference to said stock of merchandise, whereby they annulled, canceled, and set aside said contract of purchase of said stock of merchandise by this defendant, agreed that said stock of merchandise did not exceed in value the sum of \$3,000 at any time, and that this defendant should thereafter hold said stock of merchandise for the plaintiff and as his property until an opportunity presented itself for the plaintiff to trade said stock to some third person in conjunction with another stock then owned by this defendant separately for other property; that some time in the month of April, 1888, the exact time this defendant cannot state, the plaintiff represented and stated to this defendant that they, the plaintiff and this defendant, could trade their respective stocks together, one of which was the stock of merchandise aforesaid, to one Isaac Peed, of Pierce county, Nebraska, for land and live stock, and at the solicitation of the plaintiff, this defendant went with the plaintiff to Pierce county to consummate said trade with the said Isaac Peed; while there the plaintiff traded said stock of merchandise referred to to said Isaac Peed for real estate, and

this defendant traded his stock of merchandise, previously and separately owned by him, to said Isaac Peed for real estate and live stock, and at the plaintiff's request this defendant delivered both of said stocks to said Isaac Peed. Thereafter and some time in the month of April or May, 1888, the exact time this defendant cannot state, the said Isaac Peed having failed to execute his conveyances of said real estate to the plaintiff and defendant respectively, as he had agreed to do, this defendant, at the request of the plaintiff, went to the residence of said Isaac Peed, in said Pierce county, Nebraska, to procure said conveyances, and he then and there ascertained that said conveyances had, at the instance of the plaintiff, been made and executed to this defendant, as grantee, and not in severalty to the plaintiff and defendant, as they should have been executed. This defendant took said conveyances to the plaintiff at Norfolk, Nebraska, and called the plaintiff's attention to the fact that he, this defendant, had been made the sole grantee therein, and the plaintiff then stated to him, as the fact was and is, that he, the said plaintiff, had caused the said Isaac Peed to make said conveyances of said real estate to this defendant as sole grantee thereof because he, the plaintiff, desired this defendant to hold the nominal title to all of said real estate procured of said Isaac Peed by the plaintiff and this defendant as aforesaid, and to execute to the plaintiff the note and mortgage sued on as an accommodation to him for short time in business; and this defendant alleges that then and there the said plaintiff stated and represented to this defendant that he desired this defendant to make and deliver to him, the plaintiff, the note and mortgage sued on in this case as a matter of business accommodation, to the end that he, the plaintiff, might use said note and mortgage as collateral security in obtaining money to start a bank with, and they should be returned to this defendant before maturity by the said plaintiff, at which time the plaintiff would take a conveyance for his part of said real estate; and the defend-

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ant says that same were executed and delivered by him to the plaintiff wholly without any consideration whatever, and as a mere matter of temporary business accommodation as aforesaid.

"3. This defendant alleges that said note and mortgage sued on are, and ever have been, wholly without any consideration whatever; that no consideration therefor ever moved from the plaintiff to the defendant therefor.

"4. That on or about the 27th day of November, 1888, the said plaintiff received of this defendant ten promissory notes made by third parties to this defendant for collection, agreeing with this defendant at the time to account to him therefor and for the proceeds thereof, which said promissory notes and the interest thereon now amount to fully \$1,000; and that the said plaintiff, before the commencement of this case, collected said promissory notes, and wrongfully and unlawfully converted the proceeds thereof to his own use and benefit, and now refuses, and at the beginning of this case did refuse, to account for or pay over the proceeds of said promissory notes to this defendant, although this defendant has frequently demanded of him to do so. Wherefore this defendant says there is, and was at the commencement of this case, due and owing to him from said plaintiff on account of said notes and their proceeds by collections the sum of \$1,000, with ten per cent interest thereon from said last named date, for which, with interest, he prays judgment against the plaintiff.

"5. That on or about the 15th day of April, 1889, he sold and conveyed to one Richard Colgraves a tract of real estate in Nebraska for the sum of \$1,200, the said plaintiff transacting the business for him, and took in payment therefor the promissory note of said Richard Colgraves; that the said plaintiff, in transacting the business, wrongfully and without authority, took said note payable to himself and not to this defendant, with ten per cent interest per annum thereon, and has collected the same and applied

it to his own use and benefit, whereby he became and was indebted to this defendant in the sum of \$1,500, which is, and was at the commencement of this suit, due and unpaid, and for which sum, with interest thereon, this defendant prays judgment against the plaintiff.

“6. That the plaintiff is indebted to him in the sum of \$1,300, with seven per cent interest thereon from the 14th day of July, 1887, for and on account of certain real estate situate in the old town of Newman Grove, Shell Creek precinct, Madison county, Nebraska, sold and conveyed by this defendant unto the plaintiff on or about the 14th day of July, 1887, at the instance and request of the plaintiff, which said real estate was then and is now of the actual value of \$1,300, and which sum, with interest aforesaid, the said plaintiff then and there undertook and promised to pay to this defendant, but has hitherto wholly failed and neglected, and still fails and neglects, to pay, though the same is long past due, and is still the property of this defendant.

“7. That each and all the matters and things herein pleaded arise out of the contract and transactions pleaded and set forth in the petition in this case, and are connected with the subject of this action.

“8. Wherefore this defendant prays judgment against the plaintiff for the sum of \$3,800, with interest and costs of suit.”

Whereupon the plaintiff moved to strike out of the answer the following:

1. “And which was worth at wholesale prices at said time not to exceed the sum of \$2,787, as the said plaintiff then and there well knew. Said stock of merchandise was at said time stored in a store-room, securely boxed and packed, and secure from examination or inspection by this defendant, except a few hundred dollars' worth of the best part thereof, which was displayed on the shelves of said store-room, and could be examined. Said stock of merchandise had been traded for by the plaintiff at Rising City, Ne.

braska, in the month of May, 1887, and at said time a pretended invoice of them had been made at their alleged wholesale value by some one to this defendant unknown, at the instance and request of the said plaintiff, which pretended invoice was wholly false, fraudulent, and untrue, and greatly in excess of the actual wholesale value of said merchandise, as the said plaintiff at the time of the transactions hereinafter stated and alleged well knew. That on or about the said 14th day of July, 1887, the said plaintiff began negotiating with this defendant for the sale to him of the said stock of merchandise, and then and there, for that purpose and to that end, falsely, fraudulently, and well knowing the same to be untrue, represented and stated to this defendant that said stock of merchandise was a first-class, fresh, A No. 1 stock of merchandise, free in all respects from any defects or impairments; that it had been purchased at wholesale less than a year prior to that time, and that he, the said plaintiff, would warrant the same in all respects as being a good, fresh, A No. 1 stock of merchandise; that all of said merchandise in boxes was as good as that displayed on the shelves, and that the latter was a fair sample of the former; and that he would warrant and guaranty to this defendant the correctness in all respects of said pretended invoice of said stock of merchandise, which said invoice he then exhibited to this defendant, showing said stock of merchandise to be of the wholesale value of \$8,808.84, and stating and representing at the time to this defendant, fraudulently and falsely, and well knowing the same to be false and untrue, for the purpose of inducing this defendant to purchase said stock of merchandise, that said invoice was in all respects true and correct and genuine, and fairly represented the wholesale value of said stock of merchandise; that at said time that part of said stock of merchandise which was displayed on the shelves of said store building was the best part thereof, and was so displayed by the procurement of the plaintiff

to mislead this defendant, and induce him to believe that the part thereof in boxes was of the same quality and value; that, relying upon the truthfulness of the said several representations, statements, warranties, and guaranties so made to him as aforesaid by the plaintiff, and believing them to be true, and believing said part of merchandise in boxes was of the same quality and value as that part thereof displayed on the shelves of said store building," beginning in line 14 and ending in line 61 of said answer.

2. "Was induced thereby to purchase and," in line 62.

3. "The sum which the plaintiff had so falsely and fraudulently represented and stated to this defendant that said stock of merchandise was worth at wholesale value," in lines 64 to 66.

4. "That this defendant would not have purchased of said plaintiff said stock of merchandise, or made said payments or given said promissory notes, but for said false and fraudulent representations, statements, warranties, and guaranties of said plaintiff so made to him by said plaintiff as aforesaid, which he relied on and believed to be true at the time. This defendant alleges and charges the fact to be that each and all of said representations, statements, warranties, and guaranties so made to him by the plaintiff as aforesaid were when made and are now wholly false and untrue and fraudulent, and were known by the said plaintiff to be false, fraudulent, and untrue when so made, and they were made by the plaintiff for the sole purpose of misleading and defrauding this defendant into purchasing said stock of merchandise, and he was thereby induced to make such purchase and payments and give said promissory notes by reason thereof; that in truth and in fact the said stock of merchandise was not a first-class, fresh, A No. 1 stock of merchandise, and was not free in all respects from defects or impairments; but on the contrary the same was rotten, old, shelf-worn, unsalable, and a condemned stock of merchandise, and did not have mer-

chantable value to exceed the sum of \$2,787, as the plaintiff then and there well knew. That said stock of merchandise had been purchased many years prior to the 14th day of July, 1887, and consisted of condemned, defective, and unsalable remnants and refuse articles of merchandise, as said plaintiff at the time well knew; that said pretended invoice was not a true, correct, or honest invoice of said stock of merchandise, or the wholesale value thereof, as said plaintiff then and there well knew, and the goods in boxes were not of the quality or the value of those displayed on the shelves, but were much inferior and of but little value, all of which was to the plaintiff well known and to this defendant unknown at the time of the making of said contract of purchase," in lines 72 to 104.

5. "Designedly and fraudulently," in line 107.

6. "Fraudulently and designedly," in line 109.

7. "Discovered the said fraud that had been practiced on him as aforesaid by the plaintiff, and annulled the said contract of purchase of said stock of merchandise, and he," in lines 116, 117, and 118.

8. "And in consideration thereof," in line 119.

Because the same are redundant, scandalous, and irrelevant. Which motion was sustained, and this is the first error assigned.

We think the court erred in sustaining the motion. The matter set forth in the answer is a part of the transaction set up as a defense. Under the Code system of pleading it is not necessary to state a cause of action or defense in any particular form. The facts are to be stated. All that the law requires is that there shall be a cause of action or defense. It looks at the real rights of the parties and aims at the protection and enforcement of such rights. In the case at bar the defendant set up the whole transaction by which he claims that he was defrauded. This he had a right to do, and the court should not have stricken out a part of his defense. By doing so it

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destroyed the whole. The court also erred in withdrawing certain matters from the jury; but it is unnecessary to discuss that branch of the case. As the defendant below was deprived of his defense, there must be a new trial. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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ROBERT KYD, SHERIFF, v. GAGE COUNTY.

FILED OCTOBER 24, 1893. No. 6434.

**Sheriffs: COMPENSATION OF JAILER: COUNTIES.** The sheriff is *ex officio* jailer of his county. He may, if he so elect, appoint a jailer who shall be a deputy, and take the oath required by law. The jailer is not paid a salary, but is allowed for the board and care of prisoners actually confined in the jail, and "where there are prisoners confined in the county jail, one dollar and fifty cents per day," to be paid by the county.

• ERROR from the district court of Gage county. Tried below before BUSH, J.

*Alfred Hazlett and L. M. Pemberton*, for plaintiff in error.

*R. W. Sabin*, contra.

MAXWELL, C. J.

This is an action upon an account. The plaintiff alleges in his petition that he is now and has been the duly elected and qualified sheriff of said defendant since January 7, 1892, and that the said defendant is a corporation under the laws of Nebraska, having a population of over 25,000 people; that the defendant is indebted to plaintiff in the

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sum of \$3,096.93, with interest thereon at the rate of — per cent per annum from the — day of —, A. D. 1893, as money due and unpaid on a certain account, a true copy of which said account is attached, the said itemized account being for moneys due this plaintiff from said defendant for fees due him as sheriff of Gage county, Nebraska, for moneys advanced for transporting prisoners, and for board of prisoners at the request of the defendant; that said account sued on in this action was disallowed in part, as shown by the county clerk's transcript, from which disallowance the plaintiff has appealed according to law. No part of said account has been paid, and there is now due thereon from defendant to plaintiff the said sum of \$3,096.93, with interest as above set forth, for which, with costs of suit, plaintiff asks judgment against said defendant.

To this petition the county filed an answer as follows:

"Now comes the said defendant, and for answer to plaintiff's petition herein alleges:

"1. It admits that the plaintiff is the duly elected sheriff of said defendant since January 7, 1892, and that said defendant is a corporation having a population of over 25,000 people.

"2. Defendant admits that that portion of plaintiff's bill, as shown by the petition and the bills and record of the proceedings of the board of supervisors attached thereto, marked 'Custody of Prisoner,' was wholly disallowed and rejected by the board of supervisors at their regular session, as shown in plaintiff's petition, amounting to the sum of \$538.50.

"3. Defendant alleges that the sum of \$538.50 was allowed to Robert R. Kyd, the son of plaintiff, for the same period of time as jailer of said county, with plaintiff's knowledge and consent, and that said plaintiff is estopped from claiming the same thing for himself.

"Wherefore defendant asks that said action be dismissed at plaintiff's costs."

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There is also a transcript of the record containing itemized accounts and the report of the board of supervisors, as follows:

“The committee on settlement with county officers reported and recommended the allowance of certain claims, among which were the following:

16. Robert Kyd, sheriff's fees and charges, third quarter '92 .....	\$297 90
17. Robert Kyd, sheriff's fees and charges, fourth quarter '92.....	715 35
18. Robert Kyd, sheriff's fees and charges, first quarter '93 .....	1,174 76
19. Robert Kyd, sheriff's fees and charges, second quarter '93 .....	908 92

“It was moved by Supervisor Cully to adopt the report of the committee. It was moved by Supervisor Brown to amend by adopting the report with the exception of certain claims for discount. The amendment carried, and the question as amended carried.

“FRIDAY, July 14, 1893.

“It was moved by Supervisor Spencer that the county attorney be instructed to look over the bills allowed yesterday by the committee on settlement with county officers, and that he ascertain and report to this board if he finds, in his judgment, that there are any claims allowed which are not proper and legal. Carried.

“It was moved by Supervisor McClun that that part of the report of the committee on settlement with county officers relating to fees and salaries of county officers, deputies, and clerks, which were adopted yesterday, be reconsidered. Carried.

“It was moved by Supervisor McClun to refer those claims back to the committee on settlement with county officers for correction in accordance with the opinion of the county attorney. Carried.

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"The committee on settlement with county officers made the following supplemental report:

"We have examined the claims of officers, deputies, and clerks referred to us, and would recommend as follows: That the charge by Robert Kyd, sheriff, in his several bills for the custody of prisoners be disallowed, as follows: For custody of prisoners third quarter of 1892, \$129; for same in fourth quarter of 1892, \$138; for same in first quarter of 1893, \$135; for same in second quarter of 1893, \$136.50; and we further recommend that his bills be allowed at the following amounts: No. 16, at \$168.90; No. 17, at \$577.35; No. 18, at \$1,039.76; No. 19, at \$772.42."

"On motion the report of the committee was adopted."

The principal question involved is the right of the plaintiff in error to recover as jailer.

Section 42, chapter 28, Compiled Statutes provides: "That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand (\$3,000) per annum, and shall be furnished by the county commissioners, the necessary clerks or assistants, whose combined salary shall not exceed the sum of two thousand four hundred (\$2,400) dollars per annum. The sheriff shall receive the sum of two thousand five hundred (\$2,500) dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be nine hundred (\$900) dollars per annum."

The sheriff is invested with the general control of the jail of his county, and is required by statute to visit it and examine into the condition of each prisoner at least once in each month and once during each term of district court. He is not required to act as jailer, however, unless he elect to act as such in person. He may appoint a deputy, who is required to take the necessary oath before entering upon the duties of his office. The county board of each county is invested with the general supervision of the jails, subject, however, to the rules and regulations prescribed by the

district court. Taking these several provisions together, we find no authority for the allowance of a salary to either the sheriff or the deputy as jailer. The jailer is allowed compensation for boarding and care of prisoners and for fuel, lights, washing, and clothing necessary for the comfort of state prisoners. The county board of each county is required to provide suitable means for warming the jail and its cells or apartments, frames and sacks for beds, night buckets, and permanent fixtures and repairs as may be prescribed by the district judge. The sheriff or jailer is to be paid a reasonable compensation for the board of prisoners committed to the county jail, and no discrimination is to be made between those committed for violation of the criminal laws of the state and the penal ordinances of the city, except that the city will be liable to the county for persons imprisoned under its ordinances. (*County of Douglas v. Coburn*, 34 Neb., 351.) Where there are prisoners confined in the county jail he is entitled to one dollar and fifty cents per day, to be paid by the county. As no allowance was made for this service in the court below, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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GERMAN-AMERICAN INSURANCE COMPANY OF NEW  
YORK V. JOHN A. BUCKSTAFF.

FILED OCTOBER 24, 1893. No. 4146.

1. **Oral Agreements of Attorneys: ARBITRATION: EVIDENCE: PRACTICE.** Oral agreements of attorneys, entered into out of court, to submit matters in suit to arbitration will not be enforced when objection is made thereto. The only competent proof to establish an agreement made by an attorney in regard

38	135
38	147
38	151

to the disposition of a cause is the evidence of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court.

MAXWELL, C.J., dissenting. The policy contains a provision for the appointment of arbitrators to determine the amount of the loss. Under this provision arbitrators were appointed by each of the parties, who examined the property and made a report as to the amount of the loss. The appointment was authorized by the policy, and did not depend for its validity on the oral agreement of the attorneys. In my view, therefore, the point decided is not applicable to the facts.

2. **Insurance: TRIAL: EVIDENCE OF ARBITRATION: INSTRUCTIONS.**

Where there is no competent evidence of an agreement of the parties to an action to submit their matters of difference to arbitrators, it is error to submit the question of an award to the jury.

3. ———: **BUILDING VACANT OR UNOCCUPIED: QUESTION OF FACT: INSTRUCTIONS.** Whether a building covered by a policy of insurance is, or is not, vacant and unoccupied is a question of fact to be determined by the jury under proper instructions of the court.

ERROR from the district court of Lancaster county.  
Tried below before CHAPMAN, J.

The opinion contains a statement of facts.

*Harwood, Ames & Kelly*, for plaintiff in error:

There was no competent proof of submission to arbitrators. Evidence of the oral agreement entered into by counsel was incompetent. (Sec. 7, ch. 7, Comp. Stats., 1889.)

*Chas. O. Whedon*, contra, to sustain the proposition that the oral stipulation of the attorneys is binding, cited *Burnham v. Smith*, 11 Wis., 270.

Where parties have submitted matters of difference to arbitrators of their own selection, and an award has been made in pursuance of such submission, the award will be deemed binding until set aside. (*Tynan v. Tate*, 3 Neb., 388.)

NORVAL, J.

The defendant in error on and prior to the 21st day of October, 1887, was the owner of the Metropolitan Hotel building, situated on lots 16, 17, and 18, in block 45, in the city of Lincoln, upon which there were in force policies of insurance against loss by fire in the following named companies and amounts: The German-American Insurance Company, \$1,500; The Liverpool & London & Globe Insurance Company, \$3,000, and the Fireman's Fund Insurance Company, \$1,500. On the night of October 21st a fire occurred, and the building covered by the policies was partially destroyed. Proofs of loss were duly made by the insured, and the damages not being paid, the defendant in error brought suit against each of the companies. The policy in suit contained the following stipulations:

"1. No liability shall exist under this policy for loss or damage in or on any vacant or unoccupied building, unless consent for such vacancy or non-occupancy be indorsed hereon.

"2. If the risk be increased by any means without the consent of this company written hereon, this policy shall be void.

"3. In no case shall the claim be for a greater sum than the actual damage to, or cash value of, the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or liability of other insurers."

The defendant answered, setting up the above conditions of the policy, and alleged, in substance, that at and prior to the time of the fire the building was vacant and unoccupied without the knowledge and consent of the defendant;

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German-American Ins. Co. v. Buckstaff.

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that when the policy was issued the building was used as a hotel, and that shortly before the loss it ceased to be used for that purpose, and without the knowledge or consent of the company was used for the purpose of storing furniture and articles of personal property, including bedticks containing straw, hay, and other combustible materials, thereby increasing the risk. The answer further avers that the total damage to the building by reason of the fire did not exceed \$1,500, and sets up the existence, at the time of the fire, of a policy on this building for \$1,500 issued by the Fireman's Fund Insurance Company, and also a policy for \$3,000 issued by the Liverpool & London & Globe Insurance Company.

The plaintiff for reply admits the existence of the two policies mentioned in the answer, and denies all other allegations contained in the answer.

Subsequently the plaintiff filed a supplemental petition alleging, in effect, that since the commencement of the action the matters in controversy had been, by agreement of parties, submitted to John Fraas and James Tyler, as arbitrators, to ascertain and adjust the loss, who thereupon adjusted the damages and made their report in writing, a copy of which is set out in the answer as follows:

"LINCOLN, NEB., March 7, 1889.

"The undersigned, being appointed arbitrators to adjust the loss caused by fire on the veneered building on the corner of O and Eighth streets, owned by J. A. Buckstaff, find the following amount of damages: \$2,981.50.

"JOHN FRAAS.

"JAMES TYLER."

The plaintiff alleges that the defendant has not paid the amount of the award, nor any part thereof.

The defendant answered the supplemental petition by a general denial.

There was a trial to a jury, with verdict for the plaintiff in the sum of \$847.41.

On the trial the plaintiff put in evidence the so-called award. The defendant objected to its being received in evidence for the reason that the same is incompetent and irrelevant, which objection was overruled, and an exception taken.

Counsel for plaintiff in error contend that there was no arbitration, and no competent evidence was introduced on the trial to establish an agreement to arbitrate. The only proof tending to show a submission to arbitration was the testimony of the plaintiff Buckstaff, and that of Mr. Whedon, one of his attorneys. The testimony of Mr. Whedon is to the effect that, during the pendency of the suit, he entered into an oral agreement with Mr. Ames, one of the attorneys for the defendant, for the submission of the matters in dispute to arbitrators, by the terms of which each party was to select an arbitrator, and the two thus chosen were to ascertain the amount of damages done to the building by the fire, and if unable to agree they were authorized to choose a third person to act with them; that pursuant to such agreement the cause was continued over a term of court; and that John Fraas and James Tyler were selected as arbitrators, who made report as above set forth.

Mr. Buckstaff's testimony touching the matter of arbitration is as follows:

Q. Now what occurred? What did you do in respect to adjusting this loss, the arbitration?

A. Mr. Ames and I had a conversation with regard to that. He said he didn't want any lawsuit.

Q. State the facts. What was done about submitting this to arbitration?

A. The case was to be tried. Mr. Ames and I had a talk over the matter, and he said he thought we could settle it without a lawsuit, and they would appoint a man and I could appoint a man, and they could go down there and see what the damage was, and he thought we could fix it up without a lawsuit; get the facts in the case, how much

the damage was. I selected Mr. Fraas, and Mr. Ames selected Mr. Tyler, an architect here. They went down there and figured on the loss and reported it to Mr. Whedon and Mr. Ames.

The testimony of Mr. Whedon and the plaintiff was objected to, as incompetent, immaterial, and irrelevant, and not the best evidence, and not the method of proof prescribed by the statute. Exception was taken by the defendant to the overruling of the objection.

It will be observed that the alleged agreement to arbitrate was not reduced to writing, nor was such an agreement entered upon the records of the court. The question is, therefore, squarely presented, whether the oral promise of the attorney of the plaintiff in error to arbitrate the matters in litigation could be proved by the testimony of the person who heard the attorney make the agreement.

Section 7, chapter 7, Compiled Statutes, provides that "An attorney or counselor has power: I. To execute, in the name of his client, a bond for an appeal, certiorari, writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced. II. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court," etc. The language of this section is unambiguous, and its meaning is too plain to admit of more than one construction. A client is only bound by the oral stipulations of his attorney made out of court, when the same are established by the testimony of the attorney making the same. The purpose and object of the legislature in adopting the above section was to relieve the courts from enforcing oral agreements of attorneys entered into out of court, in regard to a matter pending in court, in all cases except where the contract is established by the evidence of the attorney of the

client against whom it is sought to be enforced. The language used by the legislature is : "No evidence of any such agreement is receivable except the statements of the attorney himself." Without doing violence to the language employed it cannot be construed to mean that an agreement made by an attorney can be established by the testimony of others who were present and heard it. To hold that it can would be contrary to the spirit as well as the letter of the statute. This court has more than once decided that verbal agreements entered into between attorneys out of court relating to matters in litigation will not be recognized nor enforced. (*Rich v. State National Bank*, 7 Neb., 201 ; *Haylen v. Missouri P. R. Co.*, 28 Neb., 660.)

The testimony referred to was incompetent to establish an agreement to arbitrate, and the alleged award should not have been received in evidence. Its admission could not have been otherwise than prejudicial to the defendant on the question of the amount of damages that plaintiff sustained. The defendant introduced on the trial the proofs of loss, made, signed, and sworn to by the plaintiff recently after the fire, in which the total loss or damage was stated to be \$2,500, and apportioned between the different companies carrying the risk as follows: Fireman's Fund, \$625; Liverpool & London & Globe, \$1,250; and German-American, \$625. The defendant further put in evidence a letter written by Buckstaff to the company, transmitting the proof of loss, as well as his sworn statement furnished to an agent of the company shortly after the fire, in each of which the total loss was placed at \$2,500. The plaintiff at the trial testified that the entire damage to the building was \$3,500. He called other persons as witnesses who estimated the total damages at \$3,000. It is doubtless true that Mr. Buckstaff was not precluded from proving that his loss was greater than he had stated it to be in his letter, proofs of loss, and sworn statement. It was the province of the jury to determine from the entire testimony before

them the amount of damages to the building. In view of the conflicting character of the evidence upon this issue, the introduction of the report of the arbitrators, in which the damages were placed at \$2,981.50, may have led the jury to adopt the amount stated by plaintiff's witnesses, rather than the sum admitted by Mr. Buckstaff to be his loss before suit was commenced.

Where parties, by agreement, submit their matters of difference to arbitrators selected by themselves, the award made within the range of their appointment is binding upon the parties. The validity of an award rests upon an agreement to arbitrate, and the selection of arbitrators in pursuance of said agreement. The validity of the alleged award introduced in evidence depends upon an alleged oral agreement entered into out of court between the attorneys of the respective parties, and such agreement, as we have already shown, at least to our own satisfaction, has no binding force.

We have not failed to observe the provisions in the policy in suit relating to arbitration. The policy stipulates, in effect, that in case the amount of loss is not agreed to, upon the written request of either party, the loss shall be appraised by disinterested and competent persons, one to be selected by the company, and the other by the assured, and in case of their failure to agree, at the request of either party, the two so chosen may select a third person to act with them, and the award of any two in writing to be conclusive as to the amount of damages, but that neither the appraisal nor agreement to arbitrate should be construed as evidence of the validity of the policy, or of the company's liability thereon. The policy contains the further clause "that no suit or action against the company for the recovery of any claim, by virtue of the policy, shall be sustained in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided," etc. With no degree of success

can it be maintained that the above terms of the policy give validity or force to the award in question. No arbitrators were chosen, nor has there ever been any submission of the question of damages to arbitration under the conditions of the policy. This is manifest from both the pleadings and evidence. The supplemental petition sets up that about the last of February, or the first of March, 1889, an agreement was entered into between the plaintiff and defendant whereby the case was continued over the February, 1889, term of court, and that each party should select one person as arbitrator, and that the person so chosen should ascertain, determine and state the amount of loss sustained by reason of the fire, and that in pursuance of said agreement the cause was continued, arbitrators were selected, and they made their award in writing. There is no allegation in the pleadings that the submission to arbitrators was by virtue of the conditions of the policy. All the evidence shows that the right to arbitrate depends solely upon the oral agreement of the attorneys heretofore mentioned.

Upon the subject of arbitration the court gave the following instruction, to which the defendant excepted at the time:

“In this case, evidence having been admitted before you touching the alleged award made by the persons selected by the plaintiff’s and defendant’s counsel to ascertain the extent of plaintiff’s damage, you are instructed as a matter of law that an award made in pursuance of an agreement between parties touching their differences in litigation, where the parties have submitted their matters of difference to arbitrators of their own selection, and when the arbitrators act within the scope of their authority, becomes the act of the parties, and is decisive of their rights; and if you find from the evidence in this case that the defendant insurance company authorized its attorneys to select James Tyler as an arbitrator to act on behalf of defendant in appraising the damage done to the plaintiff’s building, and

that said arbitrator proceeded to act in pursuance of such appointment and selection, in conjunction with the person selected by the plaintiff to perform a like service and duty, and made with such person a fair estimate of plaintiff's damage, that defendant will be estopped thereby from disputing the correctness of such award, or the authority of such arbitrators to make and return the same; and that said award, when regularly made and returned, will be binding upon the parties to this action touching all matters embraced therein."

There being no competent evidence that the defendant agreed to submit the matters in litigation to arbitration, that question should not have been submitted to the jury to pass upon. In view of the evidence before the jury, no verdict, other than the one returned, could have been found without disregarding this instruction.

Complaint is made of the giving of the third paragraph of the court's charge to the jury, which reads as follows:

"3. If you find from the evidence that plaintiff did not abandon the property covered by said policy of insurance, and that the same was not vacant at the time of said fire, your verdict will be in favor of plaintiff for such damage as you may find from the evidence he is entitled to recover."

The defendant submitted a request to charge, which embraced the converse of the proposition stated in the foregoing, which request was refused. It is contended that the third instruction is faulty, in that it omitted to define the meaning of the term "vacant and unoccupied" as used in the policy. The interpretation of the provisions of a policy of insurance, like those of other contracts, is for the court, and not for the jury. So it was a question of law for the court to determine what was meant by the above term "vacant and unoccupied" in the policy in suit; and whether or not the building was vacant and unoccupied was a question of fact for the jury to pass upon under

proper instructions of the court. If the instruction objected to was the only one given by the court upon that subject, then its giving would be reversible error.

The fourth instruction is as follows:

"4. You are instructed that the policy of insurance provides that if the premises insured become unoccupied without the assent of the defendant company indorsed thereon, then the policy should become void; and if you believe from the evidence that, at the time of the fire, the premises were wholly unoccupied without the assent of the defendant, the policy had become invalid, and you should find for the defendant. In determining, under the evidence, whether the premises became unoccupied before the fire and were vacant at the time of the fire, you are instructed as a matter of law that, when the property insured is a hotel, the occupancy required under such a policy as this is such occupancy as ordinarily attends a hotel. The word 'unoccupied' is to be construed in its ordinary and popular sense, and if you believe, from the evidence, that, after the making of the policy, the insured or his tenant had moved from the building in controversy, and entirely ceased to occupy the same at the time of the fire, then the policy became void. However, if you believe from the evidence that such vacancy was temporary only, and was occasioned by the fact that plaintiff's tenant was, at the time of the fire, or a short time before, moving from said plaintiff's building, and had not removed all his goods and furniture when the fire occurred, such removal would not render the premises vacant and unoccupied within the meaning of the policy of insurance, and your verdict in such case should be in favor of the plaintiff."

We are of the opinion that the third and fourth instructions, construed together, as they should be, fairly submitted to the jury the question whether the plaintiff had violated the terms of the policy.

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Liverpool & London & Globe Ins. Co. v. Buckstaff.

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As there must be a new trial, it will not be necessary to discuss the evidence, or to pass upon its sufficiency to sustain the verdict. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY  
v. JOHN A. BUCKSTAFF.

FILED OCTOBER 24, 1893. No. 4145.

1. **Review: TRIAL TO COURT: ADMISSION OF INCOMPETENT TESTIMONY.** A cause tried without a jury will not be reversed for the admission of incompetent testimony.
2. **Insurance: BUILDING VACANT OR UNOCCUPIED.** A policy of insurance provided that it should be void if the premises became vacant or unoccupied without the written consent of the company should be indorsed. The tenant occupying the insured building partially moved out the day before the fire, leaving in the building a portion of his furniture. *Held*, That the premises were not vacant or unoccupied within the meaning of the policy.

ERROR from the district court of Lancaster county.  
Tried below before CHAPMAN, J.

The facts are stated in the opinion.

*Harwood, Ames & Kelly*, for plaintiff in error, contending the building was vacant or unoccupied within the meaning of the policy and that the company is not liable, cited: *Farmers Ins. Co. v. Wells*, 42 O. St., 519; *American Ins. Co. v. Padfield*, 78 Ill., 167; *Ashworth v. Builders Mutual Fire Co.*, 112 Mass., 422; *Corrigan v. Connecticut Fire Ins. Co.*, 122 Mass., 298; *Ætna Ins. Co. v. Meyers*, 63 Ind., 238; *Cook v. Continental Ins. Co.*, 70 Mo., 610;

*Dennison v. Phoenix Ins. Co.*, 52 Ia., 457; *McClure v. Watertown Fire Ins. Co.*, 90 Pa. St., 277; *Keith v. Quinoy Mutual Fire Ins. Co.*, 10 Allen [Mass.], 228.

*Chas. O. Whedon, contra.*

NORVAL, J.

This is an action upon a fire insurance policy issued by the plaintiff in error upon the same building covered by the policy sued on in the case of *German-American Insurance Co. v. Buckstaff*, 38 Neb., 135, decided herewith. The stipulations in the policies are substantially alike, and the issues presented by the pleadings in the two cases are the same. By agreement of parties this cause was submitted to the trial court on the evidence taken in that suit. There was judgment for plaintiff in the sum of \$1,694.82.

What is said in the opinion in the case above referred to bearing upon the charge of the court does not apply to the case before us, nor will a cause tried to the court be reversed for the admission of incompetent testimony. (*Enyeart v. Davis*, 17 Neb., 228; *Willard v. Foster*, 24 Neb., 213.)

It is claimed that the building was vacant and unoccupied without the consent of the company. The proof shows that when the policy was written, and from thence until about the time of the loss, the building was occupied and used as a hotel by one William Splain, a tenant of the plaintiff. The hotel was closed to the public on October 20th, and the tenant moved out on that day or the following, and the building thereby became unoccupied, except a portion of the furniture and other personal property remained therein at the time of the fire, which occurred on the night of October 21st. As to just what amount of property was in the building when it burned the evidence is conflicting. That introduced by the plaintiff tends to prove that a considerable portion yet remained, while there is other evidence

which goes to show that all the personal effects belonging to the tenant were removed, except a table, some broken bedsteads, a few dishes, and a lot of broken crockery. There was also evidence to the effect that the tenant had paid up his rent to November 1st, while there is to be found other testimony contradicting this, and tending to show that Mr. Splain was in default in the payment of rent, and that a few days before the loss he was notified by the plaintiff to quit the premises. The plaintiff had not taken possession of the building, nor had he received the keys therefor from the tenant. Of course it was competent for the trial court to pass upon the conflicting evidence and determine what should be believed and what rejected. The finding being in favor of the plaintiff, we must regard as established every fact which the testimony in his favor tends to prove.

Is the company relieved from liability for the loss by reason of the condition in the policy declaring the policy void if the insured premises, during the term of the insurance, should become vacant or unoccupied without notice to, and consent of, the company in writing?

In *Springfield Fire & Marine Ins. Co. v. McLimans*, 28 Neb., 846, it was held that a temporary vacancy of a building will not defeat a recovery upon a policy. And there can be no doubt, both upon reason and authority, that such is the rule. Some of the authorities hold that the vacancy of a building during the time necessary for the changing of tenants of the assured will be fatal under the ordinary terms and conditions in a fire insurance policy. But we are unwilling to go that far. It seems to the writer that such a temporary vacancy was a contingency contemplated by the parties, and against which the provision was not intended to apply. Many recent authorities so hold.

In *Hotchkiss v. Phoenix Insurance Co.*, 76 Wis., 269, Lyon, J., in construing the term "vacant or unoccupied" in an insurance policy, observes: "Under certain circumstances

premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so within the meaning of that term in insurance policies. Thus, if one insures his dwelling house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insures it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases,—in *Lockwood v. Middlesex Mutual Assurance Co.*, 47 Conn., 561; *Whitney v. Black River Ins. Co.*, 9 Hun [N. Y.], 39; 1 Wood, Ins., sec. 91, pp. 208–10, and cases cited.”

The following sustain the above doctrine: *Traders Ins. Co. v. Race*, 29 N. E. Rep. [Ill.], 846; *Home Ins. Co. v. Wood*, 47 Kan., 521; *Doud v. Citizens Ins. Co.*, 21 Atl. Rep., 505; *Roe v. Dwelling House Ins. Co.*, 23 Atl., Rep. [Pa.], 718; *American Central Ins. Co. v. Clarey*, 28 Ill. App., 195; *City Planing & Shingle Mill Co. v. Merchants, Manufacturers & Citizens Mutual Ins. Co.*, 40 N. W. Rep. [Mich.], 777.

We are satisfied that the trial court was justified in finding that the premises were not “vacant and unoccupied” within the meaning of that term in the policy. The judgment is

**AFFIRMED.**

**FIREMAN'S FUND INSURANCE COMPANY OF CALIFORNIA V. JOHN A. BUCKSTAFF.**

FILED OCTOBER 24, 1893. No. 4147.

1. **Insurance: PROVISION OF POLICY LIMITING TIME TO COMMENCE ACTION.** An insurance policy contained a condition that no action thereon should be maintained unless brought within six months after the occurrence of the fire, and by another clause it was stipulated that the loss should not become payable until sixty days after the proofs of loss are received by the company. *Held*, That a suit upon the policy may be brought within six months from the expiration of the sixty days.
2. **Sufficiency of Evidence.** *Held*, That the evidence is sufficient to sustain the judgment.

ERROR from the district court of Lancaster county.  
Tried below before CHAPMAN, J.

*Harwood, Ames & Kelly*, for plaintiff in error.

*Chas. O. Whedon*, contra:

The clause in the policy limiting the time to six months from date of fire within which suit should be commenced is not binding under the facts disclosed by the record. By the terms of the policy the loss was not payable until sixty days after the proofs of loss were received at Chicago, and as such proofs were not received until November 1, after the fire, the company was not bound to pay until after the expiration of the sixty days, and an action commenced before January 1 would have been prematurely brought, and the assured had until July in which to commence action. The action was commenced May 4, and was within the time limited by the policy. (2 Wood, Fire Insurance, sec. 436; *Mayor of New York v. Hamilton Fire Ins. Co.*, 39 N. Y., 45.)

NORVAL, J.

This record presents one question not raised, nor considered in the cases of the *German-American Ins. Co. v. Buckstaff*, 38 Neb., 135, and *Liverpool & London & Globe Ins. Co. v. Buckstaff*, 38 Neb., 146, and that is, whether the action is barred by the terms of the policy. One of the stipulations in the policy is as follows:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery \* \* \* unless such suit or action shall be commenced within six months after the occurrence of the fire by reason of which the claim for loss or damage is made; and should any suit or action be commenced against this company after the expiration of the aforesaid six months, lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The policy also provides that the loss is not payable until sixty days after the proofs of loss have been received by the company at its office in Chicago, Illinois. It appears that such proofs were furnished November 3, 1887; that the fire occurred on the 21st day of October of the same year, and this action was begun on the 4th day of May, 1888.

When did the period of limitation commence to run? The identical question was before the court in *German Ins. Co. v. Fairbank*, 32 Neb., 750. It was there held that the limitation commenced to run from the time the loss is due and payable. Following that case, and the numerous authorities cited in the opinion, we must hold that the plaintiff's cause of action did not accrue until the expiration of sixty days after the proofs of loss were received by the company, and the action having been instituted within six

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First Nat. Bank of Wymore v. Myers.

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months after the expiration of this sixty days, the suit was not barred.

This case was decided in the district court upon the evidence adduced on the trial of the German-American Insurance Company against this defendant in error, and upon which the decision was based in the Liverpool & London & Globe Insurance Company case. For the reasons stated in the opinion filed herewith in the latter case, the same judgment will be entered in this.

JUDGMENT AFFIRMED.

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FIRST NATIONAL BANK OF WYMORE, APPELLANT, V.  
JAMES D. MYERS ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5250.

**Fraudulent Conveyances: CONSIDERATION.** In a creditor's bill to subject certain real estate of a debtor conveyed to third parties to the payment of a judgment upon the ground that there was no consideration, *held*, that a sufficient consideration was proved, and the deed would be sustained.

APPEAL from the district court of Gage county. Heard below before BROADY, J.

*A. D. McCandless and Samuel J. Tuttle, for appellant.*

*Griggs, Rinaker & Bibb and R. W. Sabin, contra.*

MAXWELL, C. J.

This is an action in the nature of a creditor's bill, to set aside certain deeds made by Myers and wife to Charles B. Holt. The allegations of the petition as ground for relief are as follows:

“That on the 17th day of April, A. D. 1890, and before the levy of the attachment and the rendition of a judgment in this case, the said James D. Myers and — Myers, his wife, defendants, conveyed the following of the said above described property to one Charles B. Holt, to-wit: lot 9, in block 7, in the town of Odell; lot 7, in block 10, in first addition to the town of Odell; lot 7, in block 11, in first addition to the town of Odell; lots 5 and 6, in block 5, in second addition to the town of Odell; lots 4, 5, 6, and 7, in block 6, in the second addition to the town of Odell; and the west one-half of the northwest quarter and the northeast quarter of the northwest quarter of section 19, in town 1, range 6, except one acre in the southeast corner of the forty acres described above, sold to Frank J. Truxaw; that on the 27th day of November, 1889, and before the levy of the attachment and the rendition of the judgment in this case, said James D. Myers, and — Myers, his wife, defendants, conveyed lot 4, in block 2, in the town of Odell, to August Hein without consideration; that on the 21st day of April, 1890, and before the levy of the attachment, and the rendition of the judgment in this case, said James D. Myers, and — Myers, his wife, defendants, conveyed lot 8, in block 10, of the first addition to the town of Odell to the defendant John E. Armstrong without consideration.” And the following is the prayer: “The plaintiff therefore prays that said conveyances from James D. Myers and wife to Charles B. Holt, and from James D. Myers and wife to John E. Armstrong, and James D. Myers and wife to Mrs. Anna Synovic, and from James D. Myers and wife to August Hein may be canceled, set aside, and held for naught, and said property, free from said incumbrances, be declared to be the property of the defendant James D. Myers; and the sheriff of said county may sell the same under said order of sale as upon execution, and apply the proceeds thereof in satisfaction of plaintiff’s said judgment, interest,

and costs ; that the priority of liens of this plaintiff and the defendants McKinney, Hundley & Walker and Sprague, Warner & Co. may be determined, and the plaintiff asks for such other and further relief as justice may require."

It is unnecessary to set forth the answers.

On the trial of the cause the court found the issues in favor of the defendants and dismissed the action, from which the plaintiff appeals.

The testimony tends to show that Myers and Holt had been quite intimately acquainted for fifty years or more, and seem to have been friends. Holt resides in Tioga county, New York, and Myers at Odell, in this state. In the year 1886, Holt sent to Myers the sum of \$4,600 to invest for him, at eight per cent. A part of this money was loaned out in various sums, and a part seems to have been used by Myers himself. This seems to have been known to Holt, and was perfectly satisfactory to him. He seems to have had the utmost confidence in Myers, and there is nothing in this record tending to show that this confidence was misplaced. A son of Myers was a member of a mercantile firm, and the defendant guarantied certain debts of his son, and the attachments in this case were issued on such guarantied debts. Under the issues made by the pleadings the only question presented is, was there a consideration for the deeds in question? Upon this ground there is practically no dispute. The deeds were made in good faith to secure *bona fide* debts of Myers, and will be sustained. The case is argued in the appellant's brief upon points not involved in the issues, and they will not be considered. The judgment is right and it is

**AFFIRMED.**

## CORDELIA A. BENSON V. JOHN DALY.

FILED NOVEMBER 8, 1893. No. 5223.

**Boundary Lines: ACQUIESCENCE IN SURVEY: COMPROMISE AND SETTLEMENT.** Where there is a dispute as to the exact boundary between the owners of adjoining lands, and a county surveyor establishes a line upon an actual survey of the lands, and both claimants participated in making and paying the expenses of the survey, which survey was acquiesced in for a considerable time afterwards, it will not be disturbed because a new survey, made some years afterwards, tends to show a mistake in the establishment of such line.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

*Griggs, Rinaker & Bibb*, for plaintiff in error.

*Hardy & Wasson*, contra:

The parties having agreed that the corners were lost and to have the line surveyed, and acquiesced in the survey at the time and for two years thereafter, they are estopped from disputing the line thus agreed upon. The court will sustain an agreement that has been fully executed. (*Trussel v. Lewis*, 13 Neb., 418, 419; *Brown v. Caldwell*, 13 Am. Dec. [Pa.], 660; *McAfferty v. Conover*, 7 O. St., 99; *Joyce v. Williams*, 26 Mich., 332; *Smith v. Hamilton*, 20 Mich., 438; 2 Herman, Estoppel, sec. 1135.)

MAXWELL, C. J.

This action was brought in the district court of Gage county on a cause of action which is set forth in the petition as follows: "Defendants wrongfully, and with force, broke and entered upon the plaintiff's land, of which the plaintiff was then in possession, described as follows: 'The north half of the southeast quarter of section 33, town 2

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Benson v. Daly.

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north, range 8 east, in Gage county, Nebraska,' and then tore down a fence belonging to plaintiff, standing upon said land as a line fence, of the value of \$50, and carried the same away, and converted it to their [defendants'] own use, and thereby prevented plaintiff from enjoying the use of said fence and adjoining lands." The answer is a general denial. On the trial of the cause the jury returned a verdict in favor of the defendant in error, plaintiff below, upon which judgment was rendered.

The testimony tends to show that the land in question is a part of the Otoe Indian reservation; that one Green, in the year 1883, entered the land now owned by the defendant in error, and that the plaintiff in error purchased the land owned by her about the same time. The testimony tends to show that the government surveys on the reservation are far from accurate, the lines being somewhat irregular and the corners frequently lost. Some time after the parties had purchased the land Green desired to construct a fence along the line between his land and the plaintiff in error. It was understood that this was temporarily erected until the county surveyor could be obtained to establish the true line. Some months afterwards the county surveyor was employed to establish the line between the parties. This he did, the husband of the plaintiff in error being present at the survey, and employed a chain carrier to assist in making the survey. He made some complaint about the line as established by the surveyor, but said if he had the quantity of land that his deed called for that he would be satisfied. The surveyor then ran a line across his land, and it was found that he had nearly an acre more than his deed called for. He then paid the surveyor his proportion of the expense of making the survey, although he claims that a portion of this money was paid for running a line across his land. One of the government corners of the land had been plowed up and destroyed, and there seemed to be great uncertainty as to its

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Powell v. Beckley.

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actual location. Upon the survey being made, Green moved his fence onto the line as established by the surveyor, and a year or two afterwards sold and conveyed the land to the defendant in error, when a second surveyor was obtained on behalf of the plaintiff in error, and a new line established taking a portion of the defendant in error's land and the fence in dispute. In these matters it is shown that the husband acted as the agent of his wife, and the parties for a long while acquiesced in the line established by the first survey made by the county surveyor. We are satisfied that this survey, acquiesced in as it was for a considerable time, the exact boundary being unknown, was in effect a compromise and settlement of the controversy. There is no material dispute upon the question that that settlement was accepted by the parties for a time as the end of a controversy, and will be so regarded by the court. No injustice has been done to the plaintiff in error. She has more land than she purchased, and it is desirable that the controversy should be terminated. In our view, the verdict is the only one justified by the testimony and the judgment is

**AFFIRMED.**

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**W. C. POWELL V. G. F. BECKLEY.**

**FILED NOVEMBER 8, 1893.    No. 4802.**

**Landlord and Tenant: REPAIRS ON PREMISES: CONTRACTS.**

In an action by a tenant against his landlord for repairs made by him upon the leased premises he must show a contract of the landlord, express or implied, to pay for the same to entitle him to recover.

**ERROR** from the district court of Gage county. Tried below before APPELGET, J.

*L. W. Colby and L. M. Pemberton*, for plaintiff in error:

In the absence of an agreement to repair on the part of the landlord, the premises are hired in the condition in which they are at the time of the demise, and the rent is supposed to be arranged with reference to such condition. In such case, the landlord is under no obligation to repair, and the lessee, if he wishes any repairs, must make them at his own expense. (*McAlpin v. Powell*, 70 N. Y., 126; *Witte v. Matthews*, 52 N. Y., 512; *Foster v. Peyser*, 9 Cush. [Mass.], 242, 57 Am. Dec., 43; *Cole v. McKey*, 66 Wis., 500; *Wilkinson v. Clauson*, 29 Minn., 91, 93; *Krueger v. Ferrant*, 29 Minn., 385, 387; *Lynch v. Speed*, 15 Daly [N. Y.], 207, 4 N. Y. Sup., 556; *Mumford v. Brown*, 6 Cow. [N. Y.], 475, 16 Am. Dec., 440, and note.)

*Hazlett & Le Hane*, contra.

MAXWELL, C. J.

This is an action upon an account for repairs made by a tenant:

G. F. Beckley, Dr., Proprietor of the Pacific House.

Sept. 26, To Thistlewait bill, fixing W. closet....	\$7 00
Sept. 11, To Hall's bill for painting.....	16 40
Sept. 11, To material on garret .....	16 40
Sept. 11, To labor on garret.....	6 00
Nov. 10, To Hall's bill for painting.....	21 90
Nov. 10, To Hall's bill, glass and putty.....	83
Nov. 19, To fixing doors, 8, and hall.....	75
May 1, '89, To railing on porch.....	28 00
May 1, To railing on steps .....	2 00
Apr. 19, To papering dining room .....	20 00
Apr. 4, To wall paper, room 6.....	5 45
Apr. 4, To hanging paper, room 6.....	6 00
Apr. 19, To wall paper .....	8 25
Jan. 3, To sewer pipe and plumber's bill.....	1 65

## Powell v. Beckley.

Jan. 3, To labor on sewer.....	\$6 00
Nov. 10, To ceiling water closet.....	3 00
Nov. 10, To plastering.....	6 00
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	\$165 63

Jan. 3, Brought over, Dr.....	\$165 63
Nov. 12, By cash, rent.....	\$7 00
Nov. 12, By cash, rent.....	16 52
Nov. 12, By cash, rent.....	21 90
Nov. 12, By cash, rent.....	83— 46 13
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	\$119 50

The defendant below sets up a defense as follows: "The defendant for answer to plaintiff's petition admits that on September 26 he was indebted to plaintiff for Thistlewait bill, fixing water closet, \$7; for Hall's bill for painting, \$16.40; on November 10 Hall's bill for painting, \$21.90; and for glass and putty, 83 cents; but he avers that on November 12, 1888, the defendant paid said several sums in full, amounting to \$43.13, and the same was settled between the plaintiff and defendant, and satisfied in full, by mutual agreement, by deducting from the rental then due and owing from plaintiff to defendant said sum of \$46.13. The defendant further answering denies each and every other allegation in said petition contained."

On the trial of the cause the jury returned a verdict in favor of the defendant in error for \$108.05, upon which judgment was rendered.

The testimony on behalf of the defendant in error tends to show that he leased the Pacific House in Gage county from the plaintiff in error by written lease for a term of years; that there was a collateral parol agreement that Powell should make repairs upon the house. Mr. Hazlett testifies:

Q. Now you may state if you know anything about the drawing up of the lease marked Exhibit "A" in this tes-

timony and what was said by and between the parties to said lease at the time of the signing of said written instrument, if you know, and state fully.

A. The parties were in my office prior to the date of this lease with reference thereto, but on the day it was signed Mr. Powell came into my office to have the lease executed and turned over, so they said. I had written the lease previous to this time for them, but for some reason it was not signed. They had taken it away with them, but brought it back the day it was executed into my office. It may be possible that at that time there were some insertions and interlineations made, but that I don't remember. There was considerable talk between these parties in my office the day this lease was executed, about the time Mr. Powell was going to sign the lease. I remember very distinctly of Mr. Beckley saying, "Well, I believe that this repair business should be set forth in that lease or ought to be in there," and Mr. Powell said to him at that time, it was not necessary. He says, "You go on and take that house, and if you do as you say you are going to do in the running of the house, and if you keep up your part and retain the house and pay the rent, I will see that the house is kept in good repair," or in substance that; and he says furthermore, at that time, "It is as much to my interest to keep up the house in repairs and for you to quit and turn the house over to me with a good trade that I could lease to some other person than to have the house run down; and at the end of two or three years it is worth more to me to keep the house in repair than if it wasn't." And the lease was signed.

The testimony of the defendant in error is to the same effect. The testimony on behalf of Mr. Powell conforms to his answer.

The court instructed the jury as follows:

"1. The court instructs you that this is an action brought by a tenant against his landlord for improvements and re-

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Wagner v. Ladd.

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pairs put upon and about the building while occupied by the tenant under the lease.

"2. The court further instructs you that the law of this case is that in the absence of contract to the contrary the law presumes that when one rents a building for a specific purpose that it shall be in proper condition and repair for the uses for which it is rented."

The second instruction is clearly wrong. In the absence of a contract, express or implied, to repair, the tenant takes the premises in the condition in which they are rented. For this error the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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JOHN P. WAGNER V. JAMES G. LADD.

FILED NOVEMBER 8, 1893. No. 5040.

1. **Negotiable Instruments: COUNTER-CLAIM AND SET-OFF: CONFLICTING EVIDENCE: REVIEW.** In an action on a promissory note, a counter-claim and set-off consisting of several items were set out in the answer, which on the trial the jury disallowed. The testimony being conflicting, it is impossible for this court to say with accuracy what, if any, one of the items should be allowed.
2. ———: ———: **INSTRUCTIONS.** An instruction, "When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement," *held*, applicable to the testimony and not erroneous.

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Wagner v. Ladd.

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ERROR from the district court of Gage county. Tried below before BROADY, J.

*Griggs, Rinaker & Bibb*, for plaintiff in error.

*Hugh J. Dobbs, contra* :

The second instruction correctly states the law as applicable to this case. (*McKinster v. Hitchcock*, 19 Neb., 100; *Bull v. Harris*, 31 Ill., 487; *Straubher v. Mohler*, 80 Ill., 21; *Chubbuck v. Vernam*, 42 N. Y., 432; *Sulphen v. Cushman*, 35 Ill., 186; *Kronenberger v. Binz*, 56 Mo., 121; *Chatham v. Niles*, 36 Conn., 403.)

MAXWELL, C. J.

This is an action upon a promissory note made by Wagner in favor of Ladd. The execution of the note is admitted, but Wagner pleads a counter-claim and set-off as follows :

Fall, 1888, To one service of the stallion "Counsellor" .....	\$100 00
Fall, 1888, To one service of the stallion "Plutus" .....	25 00
June, 1888, To one bridle bit.....	3 00
June, 1888, To one lock.....	1 25
Summer, 1889, To sheeting manger and feed boxes.....	4 50
Summer, 1889, To one pane of glass.....	50
Summer, 1889, To use of stall six months at \$1.50.....	9 00
Nov., 1886, To amount due defendant and retained by plaintiff from the wages of J. W. Andrews to apply on note given by Andrews to this defendant.....	50 00
To interest.....	15 00
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	\$208 25

On the trial of the cause the jury found a verdict in favor of Ladd for the full amount of the note and interest, and judgment was rendered on the verdict.

Two grounds of error are assigned in this court: First, that the verdict is contrary to the evidence; and second, that the court erred in giving the second instruction.

1. The testimony is conflicting upon the contested points, and it is impossible for this court to say with accuracy what items, if any, should be allowed and what rejected. The questions were properly submitted to a jury and the verdict will be sustained.

2. The second instruction is as follows: "When a settlement is made, and a promissory note is given as a result of the settlement, the giving of the note is *prima facie* evidence that all matters in difference between the parties at the time of the settlement were settled in the settlement; and this presumption must prevail until a preponderance of the evidence shows that there were matters in the difference at the time between the parties that were not included in such settlement."

In *McKinster v. Hitchcock*, 19 Neb., 100, this court held that "An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions. As distinguished from a mere admission or acknowledgment, it is a new cause of action. It is not a contract upon a new consideration, and does not create an estoppel, but establishes *prima facie* the accuracy of the items charged without further proof." In our view the instruction comes within the rule there stated, and, as applied to the testimony in the case, is not erroneous. There is no error in the record and the judgment is

AFFIRMED.

**GAGE COUNTY V. ROBERT R. KYD.****FILED NOVEMBER 8, 1893. No. 6425.**

1. **Counties: LIABILITY FOR COMPENSATION OF JAIL GUARD.**  
An account was filed with the county clerk by one K. as jailer of G. county. From this account the county board deducted \$179.50, from which K. appealed to the district court. Pleadings were filed in the district court in which K. claimed as jail guard, and that the account as jailer was a mistake. The court found the issues in favor of K., in effect that he was jail guard and not jailer.
2. ———: ———. A jail guard, when actually necessary for guarding prisoners, is entitled to \$2 per day, to be paid by the county.

**ERROR** from the district court of Gage county. Tried below before BUSH, J.

*R. W. Sabin*, for plaintiff in error.

*Alfred Hazlett*, contra.

**MAXWELL, C. J.**

The defendant in error filed a claim with the county clerk of Gage county for services as jailer of that county, the sum claimed being \$718. The county board allowed him \$538.50 and disallowed \$179.50. From the order thus made the defendant in error appealed to the district court. In the district court the claim is made for services as jail guard, and upon this issue the action was tried, and the court rendered judgment in favor of the defendant in error for the amount sued for, \$179.50 and costs. From this judgment the plaintiff in error brings the case into this court.

Section 5, chapter 28, Compiled Statutes, provides: "For guarding prisoners, when it is actually necessary, \$2 per day, to be paid by the county." The action in the district

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Gage County v. Wilson.

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court was for guarding prisoners, it being alleged on behalf of the defendant in error that the account as jailer was a mistake. However that may be, the only question that can be considered in this court is the right of the defendant in error to compensation as jail guard. If he was such guard, he is entitled to recover for the number of days charged in the account, and he is entitled to compensation at the rate fixed by statute. The court below found that he was jail guard and not jailer, and this finding seems to conform to the proof. He was, therefore, entitled to \$2 per day for the time actually employed as such guard. The judgment of the district court is right and is

AFFIRMED.

38	165
46	297

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**GAGE COUNTY V. THOMAS E. WILSON, DEPUTY COUNTY CLERK.**

FILED NOVEMBER 8, 1893. No. 6426.

**Counties: LIABILITY FOR SALARY OF DEPUTY COUNTY CLERK.**

A deputy county clerk is to be paid his salary out of the fees received by the county clerk in excess of the amount which he is authorized to retain. The county is not liable for such salary.

**ERROR** from the district court of Gage county. Tried below before BUSH, J.

*R. W. Sabin*, for plaintiff in error.

*Alfred Hazlett* and *L. M. Pemberton*, contra.

**MAXWELL, C. J.**

The defendant in error is deputy county clerk of Gage county, and filed an account against said county for the

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sum of \$833.33, for salary as such deputy county clerk from October 7, 1892, to August 7, 1893. The account was disallowed by the county board of Gage county, from which order the defendant in error appealed to the district court of that county. In the district court judgment was rendered in his favor against said county for the sum of \$833.33, from which judgment the county brings the case into this court.

The case depends upon a proper construction of section 3043 of Cobbey's Statutes, which is as follows: "That every county judge, county clerk, county treasurer, and sheriff of each county, whose fees shall in the aggregate exceed the sum of \$1,500 each for the county judge and county clerk, and \$2,000 each for sheriffs and county treasurers, per annum, shall pay such excess into the treasury of the county of which they hold their respective offices; *Provided, however,* That in counties having over 25,000 inhabitants, the county treasurer shall receive the sum of \$3,000 per annum, and shall be furnished by the county commissioners the necessary clerks or assistants, whose combined salary shall not exceed the sum of \$2,400 per annum. The sheriff shall receive the sum of \$2,500 per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be \$900 per annum. The county clerks of such county shall receive the sum of \$2,500 per annum, and he shall have one deputy whose salary shall be \$1,000 per annum. The county judges of such counties shall receive the fees of such office not to exceed the sum of \$2,000 per annum, and shall be provided by the county commissioners with the necessary clerks or assistants, whose combined salaries shall not exceed the sum of \$1,000 per annum; *And provided further,* That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not

exceeding the sum of \$700 per year for each of such deputies or assistants, except in counties having over 70,000 inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

The object of this statute was not to make the office of county clerk, and other offices named, a salaried office, but to fix a limit in the amount received and retained, and require the excess to be paid into the county treasury. It provides for the appointment of certain deputies for each of the officers named and that the county board shall determine the number of deputies and amount of salary of each, not to exceed the sum specified in the statute. The deputies, however, are to be paid out of the fees of the office, and not from the county treasury. The claim in this case is against the county, and in our view the county is not liable, as the salary of the deputy is to be paid by the principal out of the fees received by him in excess of the amount which he is to retain. The judgment of the district court, therefore, is erroneous and is reversed and the order of the county board reinstated.

JUDGMENT ACCORDINGLY.

38 168  
16 298

## GAGE COUNTY v. ED. J. WILSON, DEPUTY SHERIFF.

FILED NOVEMBER 8, 1893. No. 6427.

**Counties: LIABILITY FOR PAYMENT OF SALARY OF DEPUTY SHERIFF.** The county judge, clerk, treasurer, and sheriff, where the fees exceed the amount fixed by statute, and are authorized to appoint a deputy or deputies, may, in addition to their own salary, retain from the fees of their respective office "such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the county board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." The county is not liable for the deputy's salary. It is to be paid out of the fees of the particular office.

ERROR from the district court of Gage county. Tried below before BUSH, J.

*R. W. Sabin*, for plaintiff in error, cited: *Albertson v. State*, 9 Neb., 430; *Ryan v. State*, 5 Neb., 276; *State v. Ream*, 16 Neb., 684; *Ragoss v. Cuming County*, 36 Neb., 375.

*Alfred Hazlett, contra.*

MAXWELL, C. J.

This action was brought by the defendant in error against Gage county for salary as deputy sheriff from September 7, 1892, to July 7, 1893, a period of ten months, at \$75 per month. The claim was rejected by the county board, but on appeal to the district court was allowed and judgment rendered accordingly. The right of defendant in error to recover depends upon the construction given to section 3043, Cobbey's Statutes. It is there provided that the officer "may retain such amount as may be necessary to pay

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Greer v. Canfield.

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the salaries of such deputies or assistants as the same shall be fixed by the board ; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." Under this statute the principal is to pay the salary of the deputy. He collects the fees pertaining to his office, and is authorized to retain a certain amount in payment of his own salary, a certain other amount for the payment of the salary of each of his deputies, and the surplus, if any there be, is to be paid into the county treasury. The county is not liable to the deputy for his salary. The judgment of the district court is reversed and the order of the county board rejecting the claim

AFFIRMED.

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JOHN C. GREER V. JOHN CANFIELD.

38	169
49	743

FILED NOVEMBER 8, 1893.    No. 4655.

1. **Arbitration and Award :** A VERBAL SUBMISSION of the matters in controversy between parties, who appear voluntarily, and testify themselves, and produce witnesses in support of their respective claims, will, if fairly conducted, be sustained after the making of the award.
2. ———: **FAILURE TO SWEAR ARBITRATORS AND WITNESSES.** The fact that neither the witnesses nor the arbitrators were sworn, when no objection is made on that ground, will not invalidate the award.
3. **Review.** The claim that the award was made on Sunday, *held* not sustained by the proof.
4. **Action on Award : DEFENSE.** Where matters in controversy are submitted to arbitrators, proof taken, and an award made, and an action brought thereon, an answer which fails to show that the arbitrators exceeded their powers, or did not consider some of the matters submitted, or did an injustice to the defendant, fails to state a defense.

ERROR from the district court of Johnson county.  
Tried below before BROADY, J.

*S. P. Davidson*, for plaintiff in error.

*D. F. Osgood*, contra.

MAXWELL, C. J.

This is an action upon an award. There are three defenses set up in the answer: First, a denial that arbitrators were appointed, or that the submission was in writing; second, that the award was made on Sunday; third, that an uncle of the defendant was officious in conference with the arbitrators. On the trial of the cause the jury returned a verdict in favor of the plaintiff below in the sum of \$468.67, on which judgment was rendered. It is doubtful if the answer states any defense, but as no question is raised upon it, the court, on its own motion, will treat it as sufficient. The mode of submission is stated by O'Connell, one of the arbitrators, as follows:

Q. Did they state, or did any one state, in their presence at that time, that you were to decide all matters of difference between them?

A. Why, I don't know that those words were used, but that is the way I understood it.

Q. As a matter of fact you did not undertake to go through their whole business transactions?

A. We undertook everything they laid before us.

Q. Their whole business transactions you did not go through?

A. I suppose they laid all before us that they wanted us to settle, and we passed on all, except a few things spoken of in this Exhibit "A."

Q. No articles mentioned that you were to settle?

A. Not at that meeting. After we began, Hedrick wrote down notes, and goods, and horses, etc., and he wrote them

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down on a piece of paper. We got to work; took the first item,—such a note. If they both agreed on that, we took that. Then there were several articles they could not agree on, and one said one thing and another another, and we would have to have evidence. We took off everything they agreed on, and there were things they didn't agree on, and we decided them.

Q. You never gave a written decision other than that?

A. That is all the decision we ever made. I believe we wrote two, one for each party.

Q. You never decided each one of these items and notified them?

A. No, sir; but we did settle each item. There would be such a note they agreed on—for instance, the price of a horse they could not agree on; and then there were several other things. We decided these things separately and then added up the amount, and that is the way we arrived at the conclusion.

Q. You never notified Greer?

A. No, sir; we didn't.

Q. Now, as a matter of fact, didn't Greer ask you for an itemized list of them?

A. Yes; I met him Sunday afternoon, and there was one account he asked me how we arrived at. I said, "If there is any particular thing, I think I can remember it." There were some \$2,000 John collected, and he asked what commission we allowed. I said, we allowed him five per cent. He wanted fifteen per cent and had that charged up; and he found a good deal of fault with that, and appeared wrathful, and he wanted an itemized statement.

Q. You got pretty wrathful yourself?

A. Well, slightly. I says, "If there is any made, Hedrick will make it." I told Hedrick, and he didn't make it; at least he told me he didn't.

Q. Greer asked an itemized account of your decision?

A. Yes, he did.

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Q. And you refused to furnish it?

A. Well, I didn't furnish it.

Q. And Hedrick didn't furnish it?

A. I think not, at least he told me he hadn't.

Q. By the court: You have been county judge in this county, have you?

A. Yes.

Q. That was back in roller-skate time, was it?

A. Yes.

Q. By Mr. Davidson: When you began this first session of this arbitration did you and Mr. Hedrick take any oath?

A. No, it was all irregular as far as that was concerned. I spoke about that. We went over as friends, just as a court and jury, friendly until the thing was over.

Q. You never took any oath?

A. No, sir; we never administered an oath to the witnesses; we just heard their story and tried to use common sense in deciding it.

Mr. Greer testifies on the same subject:

Q. You say at the time you first met it was agreed that all the difference between you and Canfield should be settled by the arbitrators?

A. Yes.

Q. Were you present at the time of this debtor and credit business?

A. Yes.

Q. That was especially spoken of at that time as to being settled?

A. Yes.

Q. Were there any items spoken of at that time especially to be settled by them?

A. If anything come up I had not credited Canfield with, I told them if he would bring evidence there I would allow on the statement. I thought there were some items I had not credited him with, as I didn't keep a correct account. I would allow all these accounts, and if I owed him anything I would pay it, that was not on the statement.

Q. That was said there at that time, was it?

A. Yes.

Q. They were to consider these when they come up at that time?

A. Yes.

Q. Any other items you had not credited him with or debited him with were to be considered in arbitration in addition to the list or itemized account you had furnished him?

A. Yes.

Q. Now you agreed that O'Connell and Hedrick should be arbitrators?

A. Well, I did, for there was no other chance to get a settlement out of him. I simply did it. I was more than anxious to get it settled, and that is the only way they wanted to settle.

Q. You thought they were good men, didn't you?

A. Yes; I had no reason—well, I knew one was a friend to me and the other was not an enemy, and I didn't think they would do me injustice.

Q. You don't think they would, do you?

A. I don't know whether they would or not.

Q. You say when Canfield came out he simply asked you how you liked the award?

A. Yes.

Q. And you told him you didn't know how it was yet?

A. Yes.

Q. That you had not the items that were settled?

A. Yes.

Q. He didn't ask you to pay it?

A. No, sir.

Q. When was it he was out there?

A. I think about three days after Sunday, probably two or three days.

Q. Probably Tuesday or Wednesday, probably about March 5?

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A. Yes, I think about March 5.

Q. How long was he in the bank?

A. Probably a minute or two minutes.

Q. Any one else present?

A. Yes.

Q. Who?

A. Mr. Russell.

Q. That is your father-in-law?

A. Yes, and I think some one else.

Q. Did he say anything to him about the award?

A. He and I had all the talk there was about it.

Q. They discussed it, did they?

A. Yes, a few words were spoken about it. I don't remember what they were.

Q. You submitted all the matters you wanted to to the arbitrators, didn't you? They didn't refuse to hear anything you wanted them to?

A. No; I don't think they refused to hear; but they refused to render their decision to things I wanted them to.

Q. What was it?

A. One note.

Q. The Sharrett note, was that?

A. Yes.

Q. Didn't you and Canfield finally agree that they should not decide that?

A. We did about that. They said they would not decide that.

Q. You and Canfield then agreed they should not decide that?

A. Yes.

Q. Also the tank?

A. Yes.

Q. You agreed they should not pass upon these two items?

A. I agreed to that, for they would not; didn't seem to want to.

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Q. All the other matters you submitted they passed upon?

A. Yes.

This was a good common law arbitration. The matters in dispute between the parties, except the two items withdrawn by consent, were submitted to the arbitrators and a settlement made. The account seems to have been very much complicated and carelessly kept, so that the mode adopted by the arbitrators to do justice between the parties was proper and calculated to elicit the truth. The fact that the witnesses were not sworn is not sufficient to justify the setting aside of the award. Other testimony was taken without objection and treated by the parties and the arbitrators as truthful, and no objection even now is made that any witness testified to what was untrue. The defense that the arbitration was made on Sunday is not borne out by the testimony. It is true the arbitrators, on Sunday, to accommodate the plaintiff in error, heard some explanations in his behalf in regard to some part of his claim; but he cannot very well insist that the arbitration is void for that cause. It may well be doubted whether, if all that is claimed in the answer is true, the award will be void; and no sufficient cause is either pleaded or proved for setting the award aside. This is a common law award, and a submission made by either party, either by word or deed, is sufficient. If the submission is by word, there is no remedy to recover on the award except by action; but the award, if fairly made within the scope of the matters submitted, will be valid and binding. (*Tynan v. Tate*, 3 Neb., 388.) There is no error in the record and the judgment is

AFFIRMED.

## JOHN S. HARRINGTON V. BENJAMIN BIRDSALL.

FILED NOVEMBER 8, 1893. No. 4873.

1. **Land Contracts: DEFAULT IN PAYMENT OF PURCHASE MONEY: FORECLOSURE: TENDER OF DEED.** In an action by a vendor of real estate to foreclose a land contract, or bond for a deed, on account of the failure and refusal of the vendee to pay the purchase money according to the contract, a tender of a deed by the plaintiff before bringing the suit need not be shown.
2. ———: ———: ———: ———: **COSTS.** The failure to tender a deed could, at most, only affect the question of costs.
3. ———: ———: ———: ———. Courts of equity will decree a strict foreclosure of land contracts only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable and unjust to refuse them. Rule applied.
4. **The statute providing for stay of execution and orders of sale does not apply to decrees of strict foreclosure.**

ERROR from the district court of Buffalo county. Tried below before CHURCH, J.

*W. L. Hand*, for plaintiff in error:

A tender of a deed by a vendor in a land contract must be made before an action can be maintained in equity for a foreclosure. (*Willard v. Tayloe*, 8 Wall. [U. S.], 557; *Cole v. Wright*, 50 Ind., 296; *McCaslin v. State*, 44 Ind., 151; *Turner v. Lassiter*, 27 Ark., 662; *Wakefield v. Johnson*, 26 Ark., 506; *Klyce v. Broyles*, 37 Miss., 524; *Wyvel v. Jones*, 33 N. W. Rep. [Minn.], 43.)

One who claims a forfeiture must show a readiness and willingness on his part to perform the contract. (*Post v. Garrow*, 18 Neb., 682.)

No agreement for a forfeiture is contained in the contract. No forfeiture will be declared when the parties have

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47	716
38	176
54	785
38	176
59	188

not stipulated for one. (*Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis., 372; *Hull v. Northwestern Mutual Life Ins. Co.*, 39 Wis., 405; *Hall v. Delaplaine*, 5 Wis., 206; *Ewald v. Northwestern Mutual Life Ins. Co.*, 60 Wis., 431; *Jacoby v. Stetler*, 4 Atl. Rep. [Pa.], 342.)

Equity does not lend its aid to enforce a forfeiture. (*Marshall v. Vicksburg*, 15 Wall. [U. S.], 146.)

Under a land contract an equitable interest passes to the vendee. (*Shaw v. Foster*, 5 L. R. H. L. [Eng.], 321; *Rose v. Watson*, 10 H. L. Cas. [Eng.], 672\*; *Wall v. Bright*, 1 J. & W. Rep. [Eng.], 494; *Lysaght v. Edwards*, L. R., 2 Ch. D. [Eng.], 499; *Vail v. Drexel*, 9 Ill. App., 439; *Moore v. Burrows*, 34 Barb. [N. Y.], 173; *McKechnie v. Sterling*, 48 Barb. [N. Y.], 330; *Jennisons v. Leonard*, 21 Wall. [U. S.], 302; *Bissell v. Heyward*, 96 U. S., 580.)

There is no sensible distinction between the cases of a legal title conveyed to secure the payment of a debt and a legal title retained to secure the payment of a debt. In both cases courts of equity consider the estate only as a security for the payment of the debt. (*Graham v. McCampbell*, Meigs [Tenn.], 56; *Lewis v. Boskins*, 27 Ark., 63; *Moore v. Anders*, 14 Ark., 628; *Curtis v. Buckley*, 14 Kan., 449; *Connor v. Banks*, 18 Ala., 42; *Sparks v. Hess*, 15 Cal., 186; *Lewis v. Hawkins*, 23 Wall. [U. S.], 119; *Relfe v. Relfe*, 34 Ala., 504.)

In the foreclosure of a title bond the purchaser is treated as a mortgagor, for all purposes of the suit. The rights of the parties are the same as those of the parties to a formal mortgage. (2 Jones, Mortgages, sec. 1449.)

The vendor has an equitable lien upon the land for the unpaid purchase money. (*Rhea v. Reynolds*, 12 Neb., 128; *Dorsey v. Hall*, 7 Neb., 465; *Whitehorn v. Cranz*, 20 Neb., 392; *Birdsall v. Cropsey*, 29 Neb., 672.)

Whenever property is transferred, no matter in what form, or by what conveyance or contrivance for the trans-

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fer thereof, if in reality it is security for a debt or the performance of some condition, equity will treat the transfer, in effect, as a mortgage, and it is not material that the person in whom the right of redemption is recognized has only an equitable title. (*Marshall v. Thompson*, 39 N. W. Rep. [Minn.], 311; *Niggeler v. Maurin*, 24 N. W. Rep. [Minn.], 369; *Fisk v. Stewart*, 24 Minn., 97; *King v. Remington*, 29 N. W. Rep. [Minn.], 352; *Livingston v. Ives*, 27 N. W. Rep. [Minn.], 74; *Hoile v. Bailey*, 17 N. W. Rep. [Wis.], 322; *Starks v. Redfield*, 9 N. W. Rep. [Wis.], 168; *Russell v. Southard*, 12 How. [U. S.], 152; *Carr v. Carr*, 52 N. Y., 258; *Morris v. Budlong*, 78 N. Y., 553; *Bowery Nat. Bank v. Duncan*, 12 Hun [N. Y.], 405; *Church v. Kidd*, 3 Hun [N. Y.], 265; *Wilson v. Richards*, 1 Neb., 343; *Omaha Book Co. v. Sutherland*, 10 Neb., 336; *Schade v. Bessinger*, 3 Neb., 145, and cases cited.)

When once the rule is established that a land contract is a security, and therefore a mortgage, the statutory requirements in regard to foreclosure and sale apply and must be followed. (*Gregory v. Hartley*, 6 Neb., 362.)

In all foreclosures a sale must be had. Strict foreclosures are prohibited. (*Kyger v. Ryley*, 2 Neb., 22.)

In all cases of foreclosure and sale defendant has the statutory right to a stay of the order of sale. (*Spencer v. Moyer*, 29 Neb., 305.)

*F. L. Huston*, also for plaintiff in error.

*Hamer, Sinclair & Brown*, contra:

A tender of the deed before bringing suit was not necessary. (*Winton v. Sherman*, 20 Ia., 295; *Rutherford v. Haven*, 11 Ia., 587; *Pomeroy*, Specific Performance, sec. 363; *Bruce v. Tilson*, 25 N. Y., 197; *Freeson v. Bissell*, 63 N. Y., 168; *Hawk v. Greensweig*, 2 Pa. St., 295; *Woodson v. Scott*, 1 Dana [Ky.], 470; *Seeley v. Howard*, 13 Wis., 375;

*St. Paul Division No. 1 Sons of Temperance v. Brown*, 9 Minn., 157; *Morris v. Hoyt*, 11 Mich., 9; *Smoot v. Rea*, 19 Md., 398; *Maughlin v. Perry*, 35 Md., 352.)

A judgment of strict foreclosure may be properly rendered upon a land contract for failure of the vendee to make the payment stipulated for. As to the form of the decree it should be that the money due on the contract be paid within such reasonable time as the court shall direct, and that in case of failure to make payment the vendee be foreclosed of his equity of redemption. (Jones, *Mortgages*, sec. 1541; *Kirby v. Harrison*, 2 O. St., 333; *Alley v. Deschamps*, 13 Ves. [Eng.], 224; *Foster v. Ley*, 32 Neb., 404; Pomeroy, *Eq. Jur.*, sec. 1262; *Landon v. Burke*, 36 Wis., 378; *Button v. Schroyer*, 5 Wis., 598; *McMillan v. Richards*, 9 Cal., 412; *Jefferson v. Coleman*, 11 N. E. Rep. [Ind.], 465; *Hayward v. Judd*, 4 Minn., 375; *Benedict v. Mortimer*, 8 Atl. Rep. [N. J.], 515.)

NORVAL, J.

This action was brought by defendant in error in the court below for the strict foreclosure of a land contract, or bond for a deed, on account of the failure of the vendee to pay the purchase money according to contract. The following is a copy of the instrument declared on:

"Know all men by these presents, that we, Benjamin Birdsall and Hannah Birdsall, husband and wife, of Kearney, Nebraska, are held and firmly bound unto Daniel A. Dorsey in the penal sum of three thousand dollars, for the payment of which we bind ourselves firmly by these premises, upon condition as follows: Whereas, the said Benjamin Birdsall and Hannah Birdsall have agreed to sell and convey unto the said Daniel A. Dorsey by deed of quitclaim, for the consideration of two thousand five hundred dollars, the following described property, to-wit: Lot number forty-nine (49), in the northwest quarter of School Section Addition to the city of Kearney, formerly

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Kearney Junction, in the county of Buffalo and state of Nebraska, and the said Daniel A. Dorsey has agreed to purchase said premises and to make payment as follows: Two hundred and fifty dollars cash in hand, the receipt of which is hereby acknowledged, and twenty-one hundred and fifty dollars on or before the 20th day of October, 1889, with interest thereon at ten per cent per annum, according to one certain promissory note of even date herewith, made by said Daniel A. Dorsey, payable to said Benjamin Birdsall, said Dorsey to pay interest according to the state of Nebraska after this date on said lot:

“Therefore, the condition of this obligation is such, that if the above bounden Benjamin Birdsall and Hannah Birdsall will convey said premises by deed of quitclaim, and clear of all incumbrances, except \$247.50, balance due the state of Nebraska upon the unpaid part of the purchase money on said lot, to said Daniel A. Dorsey, upon payment of said consideration at the times above stipulated, then this obligation to be void, otherwise to be and remain in full force and effect.”

“Witness our signatures hereto subscribed this twentieth day of October, A. D. 1888.

“(Signed)

BENJAMIN BIRDSALL.

“HANNAH BIRDSALL.

“In presence of

“A. T. GAMBLE.”

Duly acknowledged before A. T. Gamble, notary public, on the twentieth day of October, 1888.

The petition alleges the execution of the said instrument and the recording thereof in the office of the county clerk of Buffalo county on the 20th day of October, 1888; that on November 14, 1889, said Daniel Dorsey assigned all his rights under said contract to the defendant, John S. Harrington, who then assumed and agreed to pay the obligations of Dorsey thereunder; that said Dorsey and Harrington failed, neglected, and refused to pay the balance

due the state of the purchase price of said real estate, and plaintiff, in order to protect his title, was compelled to, and did, pay the state the sum of \$247.50; that at the time of entering into said agreement Dorsey gave to plaintiff the promissory note, mentioned therein, for the balance of the purchase price, calling for \$2,150, payable on October 20, 1889, bearing interest at ten per cent from date thereof; that at the maturity of said note plaintiff requested the payment of the same, which was refused; that no part of said note has been paid, and the entire sum, principal and interest, is due and unpaid; that Hannah Birdsall, who signed said contract and bond in conjunction with the plaintiff, is the wife of said plaintiff, and has otherwise no interest in said instrument, nor in the real estate therein described.

On December 10, 1890, the defendant filed an answer admitting the allegations of the petition as to said D. A. Dorsey and alleging that on the 15th day of November, 1889, for a valuable consideration, Dorsey transferred to him all his rights in and to said premises, which transfer was in writing, duly witnessed, acknowledged, and recorded; with prayer that, upon paying into court the amount ascertained to be due, the plaintiff be required to execute a deed to the defendant of said premises.

On February 2, 1891, plaintiff filed a motion for judgment upon the pleadings, and upon the next day the defendant filed an amended answer, alleging a sale of the said premises by plaintiff to Dorsey substantially as averred in the petition; that for the purpose of securing the payment of the sum of \$2,150 and interest, still unpaid, plaintiff, instead of executing a deed to Dorsey and taking a mortgage back, retained the legal title to the premises, and executed a bond for a deed, agreeing therein to convey said real estate on payment to him of the balance of the purchase price; that Dorsey took possession of the premises and remained in possession thereof until he transferred the

same to the defendant; that at no time has plaintiff offered to deliver either to Dorsey or defendant the said note for \$2,150.

The prayer is that the court adjudge that the note and bond for a deed are a note and mortgage, and for such other and further relief as provided by law.

The case was submitted to the district court upon the petition, answer, and amended answer, and there was found due the plaintiff, on account of the note and contract set forth in the petition, the sum of \$2,912.50. It was decreed that the defendant, within sixty days, pay said sum with ten per cent interest from the date of the decree, to plaintiff, and upon said payment being made plaintiff shall convey said premises by quitclaim deed to defendant; but in case of failure to pay the same within said time, then said defendant, and all persons claiming under him, shall be forever barred and foreclosed of all equity of redemption, and of all right to or interest in said premises. It was further decreed that plaintiff bring the said note into court and surrender the same to the clerk of the court for cancellation; and that the bond mentioned in the pleadings be canceled and held for naught.

On February 6, 1891, three days after the date of said decree, the defendant below filed a written request for a stay for a period of nine months, which application was denied by the court, and the defendant's exception was entered.

The first error assigned is that the petition does not state a cause of action for the reason it fails to allege the tender of a deed of the premises by the plaintiff before the bringing of the suit. Under the stipulations of the parties contained in the contract or bond for a deed in question, the execution and delivery of the deed by the defendant in error was conditional that the vendee should pay the unpaid part of the purchase price, together with the amount due the state. The payment of the balance of the considera-

tion and the delivery of the deed to the premises were to be simultaneous and concurrent, and the vendor was not in default until the remainder of the purchase money was paid or tendered. The rights of the plaintiff in error were fully protected by the decree. Birdsall was ordered to make a deed to Harrington on his paying the amount found due by a day named by the court, and it was also decreed that the note mentioned in the petition should be surrendered for cancellation. It was unnecessary for the plaintiff below to allege in his petition, or prove on the trial, that he tendered to the defendant a deed of the land prior to the bringing of the action. (*Stevenson v. Maxwell*, 2 N. Y., 408; *Bruce v. Tilson*, 25 N. Y., 194; *Freeson v. Bissell*, 63 N. Y., 168; *Daily v. Litchfield*, 10 Mich., 29; *Morris v. Hoyt*, 11 Mich., 9; *Seeley v. Howard*, 13 Wis., 375; *Wasson v. Palmer*, 17 Neb., 330; *Stevenson v. Polk*, 71 Ia., 278; s. c., 32 N. W. Rep., 340; *Hawk v. Greensweig*, 2 Pa. St., 295; *Smoot v. Rea*, 19 Md., 398; *Rutherford v. Haven*, 11 Ia., 587; *Winton v. Sherman*, 20 Ia., 295.)

The last case was an action by the vendor upon a contract for the sale of land, to foreclose the defendants' interest therein. The defense was that no deed had been tendered. Cole, J., in delivering the opinion of the court, says: "In an action at law to recover the consideration agreed to be paid for real estate not yet conveyed, but which, by the contract of purchase, was to be conveyed at the time of the payment of the consideration, it has been held a sufficient defense to aver and show that the deed had not been delivered and tendered. \* \* \* But this rule does not obtain in equity cases, where the court, upon a final decree, can grant just such relief as the plaintiff may show himself entitled to, upon such conditions as shall fully protect the rights of the defendants, not only as to the subject-matter, but as to costs. A delivery or tender of deed, before bringing suit in equity for the pur-

chase money and foreclosure of lien therefor, or other equitable relief, is not necessary." We have no doubt of the correctness of the rule above stated, and it is sustained by the great weight of the authorities.

The case of *Post v. Garrow*, 18 Neb., 682, cited by plaintiff in error, is not authority to the contrary. Unlike this, that was an action at law. In that case the plaintiffs purchased a quantity of cattle of defendant, paying \$300 cash and agreeing to pay the balance on the date named for the delivery of the cattle. Plaintiffs appeared at the time and place agreed upon, with the money, for the purpose of receiving the cattle, but defendant failed and refused to deliver the stock. In an action on the contract by the buyer for damages for the non-delivery of the cattle, and to recover the money advanced, it was held that it was not incumbent on the plaintiffs to prove a tender of the balance of the purchase price, and that the defendant could not claim a forfeiture of the \$300 without showing that he was ready and willing to perform on his part the contract in every particular. The authorities draw a distinction between an equitable action to enforce a contract and a suit at law for damages for non-performance. As stated by the court in *Bruce v. Tilson*, 25 N. Y., 198, *supra*, "In the latter, the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former, the contract itself, and not a breach of it, gives the action." In the case at bar, the failure of the plaintiff to tender a deed does not affect the merits or rights of the parties. At most it could only bear upon the question of costs.

Counsel for plaintiff in error insist that the plaintiff below cannot have a strict foreclosure, and urge that the decree should have been for a sale of the premises as in ordinary foreclosure cases. This question, it seems to the writer, has been set at rest by the decisions of this court in *Foster v. Ley*, 32 Neb., 404, and *Gallagher v. Giddings*, 33

Neb., 222. The former was an action by the vendor for the specific execution of a land contract which contained no express condition of forfeiture. The plaintiff tendered his deed and demanded payment of the purchase money, which was refused. The defendant contended that, as the contract made no provision of forfeiture in default of the vendee's complying with the terms of payment, the contract must be regarded in the nature of a mortgage, and that the vendee was entitled to the benefit of sale, as under ordinary mortgage foreclosure proceedings. The district court rendered a decree that the defendant comply with his contract within thirty days by making the payments and executing the notes and mortgage according to the contract, and upon failure to pay the money and execute the notes and mortgage, and received from plaintiff a deed to the premises within said time, that defendant forfeit all right, title, and interest to and in the premises. On appeal to this court the decree of the trial court was affirmed. It was held that plaintiff might have brought an action to foreclose the contract, but that was not his only remedy.

In the opinion in *Gallagher v. Giddings*, 33 Neb., 222, *supra*, it is said that "the warranty deed of April 22, 1885, executed by Giddings and wife and Eiseman, although absolute in form, being given as security for a loan of money, in equity is regarded as a mortgage. Although the grantor, E. F. Gallagher, is considered only a mortgagee, the deed conveyed the legal title to the premises to him, and nothing remained in the grantors except the equity of redemption. This case is different from an ordinary mortgage, in which the title does not pass to the mortgagee but remains in the mortgagor until foreclosure and sale. (*Baird v. Kirtland*, 8 O., 21; *Kemper v. Campbell*, 44 O. St., 210; *Hughes v. Davis*, 40 Cal., 117; 1 Jones, Mortgages, sec. 339.)

\* \* \* Eiseman and Giddings brought their action to redeem from the equitable mortgage and for a reconveyance, alleging in their petition that they were ready and willing

to pay the debt, and a decree was entered that the land be reconveyed to them upon the payment, within a specified time, of the amount found due the grantee. The payment not having been made, subsequently the petition to redeem was dismissed by the court, and the right or privilege to take further legal proceedings on the subject was not given by the decree.

"In argument it is claimed by the defendant in error that the judgment of dismissal of the petition to redeem is not a bar to the equity of redemption. In ordinary mortgages the right of the mortgagor to redeem is cut off by foreclosure and sale. The legal title in such case being in the mortgagor, in order to divest him of his title there must be a foreclosure of the mortgage, a sale under the decree, and deed to the purchaser at the sale; and when a deed, although absolute in form, is intended as a mortgage, the equity of redemption of the grantor may be barred by foreclosure proceedings. But the legal title in such an equitable mortgage being in the grantee, where the grantor brings an action to redeem the premises, and his petition is dismissed by reason of his default in making payments by the day set in the decree for redemption, and no privilege is given to bring another action, the grantor's right of redemption is thereby extinguished." (See 36 Cent. L. J., 471.)

The case at bar falls within the principle laid down in the decisions just cited. The remedy by strict foreclosure of land contracts cannot be resorted to in all cases. The remedy being a harsh one, courts of equity will decree a strict foreclosure only under peculiar and special circumstances. Applications of that character are addressed to the sound legal discretion of the court, and they will be granted in cases where it would be inequitable to refuse them. If the vendee or purchaser has not been guilty of gross laches, nor unreasonably negligent in performing the contract, a strict foreclosure should be refused on the ground

that it would be unjust, even though the vendee may have been slightly in default in making of a payment. So, for the same reason, a strict foreclosure will be denied where the premises have greatly increased in value since the sale, or where the amount of unpaid purchase money is much less than the value of the property. On the other hand, if the vendee, without sufficient excuse, fails to make his payments according to the stipulations of his contract, and for an unreasonable time remains in default, the vendor may have a strict foreclosure of the contract for the sale and purchase of the land, unless some principle of equity would be thereby violated.

Applying the foregoing observations to the facts of the case at bar, we are forced to the conclusion that the plaintiff below was entitled to the relief demanded, and the court did not err in rendering a decree of strict foreclosure. But one payment has ever been made upon the land, and that was the \$250 paid when the contract was entered into. The purchaser had neglected to pay the amount due the state, and the vendor was compelled to do so to protect the title. At the commencement of the action the vendee was in default more than fifteen months, and no excuse has been given for the delay, nor has it been shown that the land has increased in value, or that it is now worth more than the unpaid purchase price. Manifestly it would be unjust, under the circumstances disclosed by this record, to render a decree of foreclosure and sale, as in ordinary mortgage foreclosure proceedings.

The only remaining objection to be noticed is, the overruling of plaintiff in error's motion for a stay of an order of sale. Had a decree of foreclosure and sale been entered, then, under the decision in *Spencer v. Moyer*, 29 Neb., 305, the defendant would have been entitled to a stay of the decree for the period of nine months, by merely filing a written request therefor within the time fixed by statute. But the statute providing for the stay of executions and orders

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of sale has no application to decrees of strict foreclosure. The decree of the district court is

AFFIRMED.

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DANIEL EGGLESTON, APPELLANT, v. SAMUEL POLLOCK  
ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5003.

**Deeds: ESCROW: DELIVERY BEFORE COMPLIANCE WITH CONDITIONS: EVIDENCE OF AUTHORITY: REVIEW.** The finding of the trial court that the deed executed by the plaintiff and deposited in escrow with a third person, to be delivered to the vendee on the performance by the latter of certain conditions, was delivered by the depository in escrow by instructions of the vendor before the conditions of the holding had been complied with, considered to be sustained by the evidence in the case.

APPEAL from the district court of Platte county. Heard below before MARSHALL, J.

*C. A. Woosley, Higgins & Garlow, and M. Whitmoyer,*  
for appellant.

*Sullivan & Reeder and I. L. Albert, contra.*

NORVAL, J.

This action was brought by appellant to set aside and cancel certain deeds covering lots 5 and 6, in block 95, known as the "Lindell hotel property," situated in the city of Columbus, and to quiet the title to said real estate in the plaintiff. From a decree in favor of defendants, plaintiff appeals.

But a single question is presented, which is one of fact, and that is, did the plaintiff authorize the delivery of his

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deed to Samuel Pollock to the property in controversy? It is undisputed that on and prior to October 31, 1890, plaintiff was the owner of the property in controversy, and against which were incumbrances aggregating about \$2,300. Samuel Pollock at the same time was the owner of a quarter section of land in Holt county, Nebraska, and a like quantity of real estate situated in Kingman county, Kansas. The lien upon the two tracts, including taxes, amounted to more than \$2,100. Negotiations were entered into between plaintiff and Samuel Pollock for the exchange of their said properties, and on the said 31st day of October an agreement therefor was entered into between them, by the terms of which plaintiff was to execute a deed to the said hotel property, conveying the same to Pollock subject to incumbrances, and said Pollock was to execute a warranty deed for the said lands in Holt and Kingman counties conveying the same to Eggleston, subject to these mortgages and taxes, which Pollock represented did not exceed \$2,100, and which plaintiff agreed to assume and pay. As the deeds were made and executed in accordance with the contract, it was also stipulated by the parties that said deeds should be left with one P. W. Henrich, in escrow, until said Pollock should furnish abstracts of title showing a perfect chain of title in himself to the said two quarter sections of land, and that the total incumbrances thereon were not more than \$2,100, and, upon such abstracts being furnished, the deeds were to be delivered to the respective parties. The conveyances were so deposited with Henrich on the date above stated, and on November 4, 1890, the deed to the hotel property was turned over by him to Pollock and placed on record. A few days thereafter the deeds to the Holt and Kingman county lands were likewise recorded. It further appears that Samuel Pollock conveyed the lots in Columbus to John G. Pollock, who together with his wife executed and delivered to one C. J. McCoy a warranty deed to said premises.

The contention of appellant is, and that is the substance of his testimony in the court below, that said Henrich, without plaintiff's knowledge or consent, and before the conditions under which the deeds were held by him had been complied with, delivered the deed to the hotel property to Samuel Pollock. It is well settled that when a deed is wrongfully delivered by an escrow to the grantee, without the knowledge or consent of the grantor and without compliance with the stipulated conditions on the part of the grantee to be performed, no title passes to the latter, and if plaintiff's testimony stood alone there would be no room for doubt that he would be entitled to the relief demanded. But there is in the record testimony which justified the trial judge in finding that plaintiff authorized the delivery of his deed to the property in dispute. P. W. Henrich testified positively and without equivocation that within a week after the deeds were placed in his hands plaintiff called upon witness, and instructed him to deliver the deed to the hotel property at any time to the grantee, and to place the other two deeds upon record, all of which witness did as directed. Appellant denied under oath that he ever authorized the delivery of the deed executed by him, but Henrich is corroborated by other testimony found in the record. C. J. McCoy testified that about the 8th or 9th of November, 1890, he informed plaintiff that he was about to trade with Pollock for the Lindell hotel property, to which Eggleston neither made any objection nor claimed any interest in the property, but stated to witness that "I traded the hotel off to an old fellow by the name of Pollock, and I guess the old fellow has got it onto me, but if he has I will have to stand by it." McCoy further testified that after the transfer of the property to him plaintiff went with him to the agent of the insurance company for the purpose of having the policies transferred to McCoy. We are persuaded that the plaintiff authorized the delivery of the deed, at least that the finding of the trial court is

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not so clearly against the weight of the evidence as to justify a reversal. The judgment must be

AFFIRMED.

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STATE OF NEBRASKA, EX REL. FRED W. MILLER, V.  
E. O. LEWIS, COUNTY CLERK.

FILED NOVEMBER 8, 1893. No. 6540.

1. **Counties: POPULATION: OFFICE OF REGISTER OF DEEDS.** Each county in this state having a population of 18,003 or more, as shown by the last national census, was entitled to elect a register of deeds at the last general election.
2. ———: ———: ———. A county having less than 18,003 inhabitants at the national census of 1890 was not entitled to elect such an officer, even though the state census of 1885 shows it possessed more than the above number of inhabitants.

ORIGINAL application for *mandamus*.

*Isham Reavis* and *C. F. Reavis*, for relator.

*Edwin Falloon*, contra.

NORVAL, J.

This was an original application for a peremptory writ of *mandamus* to compel the respondent, as county clerk of Richardson county, to include the office of register of deeds in the notices of election to be issued by him for the general election holden in said county in November, 1893. The cause was submitted upon a general demurrer to the petition.

The facts alleged are substantially as follows: Relator is a citizen of the United States and of this state, and is a resident and elector of Richardson county, and eligible to the

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office of register of deeds. Respondent is the duly elected, qualified, and acting county clerk of said county. On the 2d day of October, 1893, relator was nominated by the republican county convention of Richardson county as a candidate for the office of register of deeds in said county, to be voted for at the general election in November 1893. On the 3d day of October, 1893, by the joint action of the democratic and people's independent political parties, one W. S. McGowan was nominated as a candidate for the same office. According to the census of 1885, Richardson county contained a population of 18,688, which was sufficient, under the provisions of the act of the legislature establishing and creating the office of register of deeds, to entitle the county to that office, and in pursuance of which a register of deeds therein was elected at the general election in 1889, and the person thus elected, qualified and entered upon the discharge of the duties thereof. The national census of 1890 shows the population of said county to be 17,573. The respondent, although requested so to do, refused to include in his notices of election the office of register of deeds, on the ground that the population of the county in 1890 was less than 18,003, the number required by law to entitle the county to the office in question.

The state legislature, in 1887, passed an act creating and establishing the office of register of deeds. (Session Laws, 1887, ch. 30.) Section 1 of this act was amended by the legislature of 1889, by extending the term from two to four years. (Comp. Stats., 1889, ch. 18, sec. 77a.) The amended section provides that "at the general election in the year 1889, and every four years thereafter, a register of deeds shall be elected in and for each county having a population of eighteen thousand and three (18,003) inhabitants or more, to be ascertained by the census of 1885, and each state and national census thereafter, who shall give bond, with sufficient sureties thereon, to be approved by the county board, in the penal sum of ten thousand (\$10,000)

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dollars, conditioned for the faithful performance of his duties, and such register of deeds shall have all the power and perform all the duties relative to all papers, writings and instruments pertaining to real estate heretofore enjoined by law upon county clerks, and shall receive the compensation allowed by law therefor," etc.

It will be seen that, by the census of 1885, Richardson county had a population sufficient to entitle it, under the law, to a register of deeds, but that by the last national census the population of the county fell below 18,003, the minimum number necessary to authorize a county to elect a register of deeds. The contention of the relator is that, inasmuch as the office became established in said county in 1885, it was not abolished by reason of the population of the county, according to the national census of 1890, being less than 18,003. We cannot adopt the construction contended for by the relator. The section above quoted authorizes each county having a population of 18,003 or over to elect a register of deeds; and it was not the intention of the legislature to limit the operation of the section to counties possessing the requisite number of inhabitants at the time the act in question took effect; but the provision was intended to apply only to counties possessing a sufficient population at the period designated in the act for the election of a register of deeds, as shown by the preceding state or national census, to entitle the same to such officer. The law-makers, whether wisely or not is no concern of ours, fixed the minimum number of inhabitants which would authorize a county to choose a register of deeds, and a county whose population, ascertained in the manner indicated by the act, does not reach such limit, has no power to elect such officer, even though it may have possessed, at some time in the past, the prescribed population. Manifestly this is the meaning of the provision under consideration. This construction not only gives effect to the clause "to be ascertained by the census of 1885, and each state and national census

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 Depriest v. McKinstry.
 

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thereafter," but harmonizes with sections 2 and 3 of the act creating the office of register of deeds. Section 2 declares, in effect, that in each county containing a population of 18,003, or more, and where the offices of register of deeds and county clerk are separate, the county board shall provide office room, fire proof vaults, and necessary books, blanks, stationery, and office furniture for the use of the register of deeds; and by the next section it is provided that in each county having less than 18,003 inhabitants, and until such officers shall be elected and qualified, the county clerk shall be *ex officio* register of deeds. Our conclusion is that Richardson county, according to the census of 1890, did not possess sufficient population to entitle the electors therein to elect a register of deeds at the last general election. The demurrer to the application is sustained and the action

DISMISSED.

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MARTIN DEPRIEST, SHERIFF, v. CHAS. B. MCKINSTRY.

FILED NOVEMBER 8, 1893. No. 4096.

**Replevin: DEFENDANT NOT IN POSSESSION OF PROPERTY.** An action of replevin will not lie against one who, at the time the action was instituted, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ.

ERROR from the district court of Keith county. Tried below before HAMER, J.

*J. J. Halligan and Short & Brotherton*, for plaintiff in error.

*F. Q. Feltz*, contra.

NORVAL, J.

The action below was replevin. It was brought by Charles B. McKinstry to recover the possession of a pony. There was a trial to a jury, with verdict for the plaintiff. The defendant's motion for a new trial was overruled, and judgment was entered against him for \$7, that being the amount of damages assessed by the verdict for the illegal detention of the property, and for costs of suit taxed at \$65.68.

The petition in error contains five assignments of error, but one of which is relied upon in the brief of counsel, and that is, the verdict is not sustained by the evidence. The pony in dispute was owned originally by one H. R. Jackett, who sold it to one Frank R. Peale, who in turn sold the same to McKinstry. The evidence is clear that Peale was indebted to McKinstry, a minor, in the sum of \$65 for work and labor; and being unable to pay the claim, McKinstry induced him to purchase the pony of Jackett for him, agreeing to take the same in full payment of his demand against Peale. Jackett at the time knew that Peale was buying the pony for McKinstry. Peale gave Jackett a mortgage on the pony, on November 18, 1888, for \$65 to secure the purchase price. There is some dispute in the testimony as to the time the sale was made by Jackett to Peale, and by the latter to plaintiff below. The testimony of McKinstry and his witnesses goes to show that both sales were made, and possession of the pony delivered to McKinstry, prior to November 14, 1888. Jackett and Peale, also one or two other witnesses, testified that the sale was made to Peale on November 18, the day the chattel mortgage was given.

On the trial Peale was pretty successfully impeached by numerous witnesses who testified that his general reputation, in the community in which he lived, for truth and veracity was bad. A fair preponderance of the testimony

establishes that McKinstry had been the owner of the pony at least four days before the chattel mortgage was given to Jackett. It is certain that at the time the mortgage was executed the pony was in plaintiff's possession, and so remained, without even a suggestion by Jackett that he held a mortgage thereon, until just before this action was commenced in the spring of 1889, when the pony was taken from McKinstry under the mortgage, and thereupon replevin was brought to regain possession. The evidence satisfies us that plaintiff below is entitled to the possession of the property as against Jackett, inasmuch as Peale had no title or interest in the pony when the mortgage was executed.

Counsel for plaintiff in error in the brief say that the case in this court turns largely upon whether the defendant below had possession of the property at the time this action was instituted. This is doubtless true. Upon this branch of the case we agree with counsel that the evidence fails to sustain the verdict. There is not a scintilla of evidence in the bill of exceptions to show that the property at any time was in the possession of Depriest. On the contrary, the undisputed testimony is to the effect that he never had possession of the pony. The mortgage was placed in J. R. Kiser's hands to foreclose, who took the pony from McKinstry and put the same in Jackett's pasture, where it remained until taken under the replevin writ.

It is evident that the suit was brought against the wrong party. Replevin will not lie against one who, at the commencement of the action, was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ. (Cobbey, Replevin, secs. 61, 63, 64; *Kittridge v. Miller*, 45 Mich., 478; *Burt v. Burt*, 41 Mich., 83; *Bacon v. Davis*, 30 Mich., 157; *Hinchman v. Doak*, 12 N. W. Rep. [Mich.], 39; *Johnson v. Garlick*, 25 Wis.,

705; *Grace v. Mitchell*, 31 Wis., 539; *Moses v. Morris*, 20 Kan., 208.)

The petition in the case was in the usual form, and, among other things, averred that the defendant unlawfully detained the property. The answer was a general denial, which cast upon the plaintiff the burden of proving not only that the property was in the defendant's possession or control when the suit was instituted, but that he wrongfully withheld possession of the same from the plaintiff. He wholly failed to prove either. The fact that Kiser, who took the pony from the plaintiff below under the chattel mortgage, was a deputy sheriff, was no justification for bringing this action against Depriest, the sheriff. There is no claim that the deputy acted under the directions of the sheriff, so as to make the latter in any manner responsible for his acts. Kiser did not procure the property by virtue of a legal writ, but in what he did he was merely the agent of the mortgagee.

It is certain that this action will not lie against Depriest, and it being established by uncontradicted testimony that the pony was not in his possession when the replevin writ was issued and served, the court below should have dismissed the action at the costs of the plaintiff. It was error to render judgment against the defendant for damages. As the property was not taken from him under the writ, and as he claimed on the trial no right or title to the same, the defendant was not entitled to a judgment for a return of the property, but was simply entitled to a judgment of dismissal, and for costs. The judgment of the district court is reversed, and the action is dismissed at the costs of the defendant in error in both courts.

REVERSED AND DISMISSED.

**J. L. ROBERSON V. JOHN P. REITER.****FILED NOVEMBER 8, 1893. No. 4936.**

1. **Mortgages: ESCROW: DELIVERY.** Where a mortgage is executed and deposited in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery thereof by the custodian to the mortgagee, without the knowledge or consent of the mortgagor, before the fulfillment of the conditions by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter, or upon an assignee with notice. A mortgage delivered to a third party in escrow, to be by him delivered upon the happening of some contingency, or upon the performance of some condition, does not become effectual as a delivered instrument until such second delivery.
2. **Rulings on Admission of Evidence: REVIEW.** The assignments of error, based upon the rulings of the trial court on the admission of testimony, considered and overruled.
3. **Negotiable Instruments: RIGHTS OF ASSIGNEE AFTER MATURITY.** The assignee of a promissory note and chattel mortgage, who purchased them after maturity, holds them subject to all the defenses which could have been made by the maker had they remained in the hands of the original payee or holder.
4. **Replevin: FORM OF JUDGMENT.** In an action of replevin, where the property replevied has been delivered to the plaintiff under the writ, in case the verdict finds for the defendant, the judgment must be in the alternative for a return of the property, or the value thereof, or the value of the possession of the same, and for damages.
5. ———: ———: **REVIEW: PRACTICE.** Where the judgment is not in the alternative form, a new trial will not be granted by the supreme court for that reason, but the cause will be remanded to the trial court to render the proper judgment upon the verdict.

**ERROR** from the district court of Red Willow county.  
**Tried below before COCHRAN J.,**

**The facts are stated in the opinion.**

*J. L. Roberson and H. J. Whitmore*, for plaintiff in error:

The note and mortgage are admitted, and also default in the payment thereof. The plaintiff is therefore entitled to the possession of the property, unless the defendant can establish payment or satisfaction of the mortgage in some way. (*Case Threshing Machine Co. v. Campbell*, 14 Ore., 460; *Jones, Chattel Mortgages*, sec. 706, and cases cited; *Holland v. Griffith*, 13 Neb., 473; *Lathrop v. Cheney*, 29 Neb., 456.)

The court erred in not rendering an alternative judgment. (*Lee v. Hastings*, 13 Neb., 511; *Hooker v. Ham-mill*, 7 Neb., 236; *Frey v. Drahos*, 7 Neb., 201.)

*W. S. Morlan*, and *W. R. Starr*, contra:

The irregularity in the form of the judgment was not called to the attention of the trial court. No motion was made to correct the same. In this case, if there was error, it was error without prejudice. (*Armstrong v. Lynch*, 29 Neb., 91.)

NORVAL, J.

This was an action of replevin by J. L. Roberson against John P. Reiter to recover the possession of certain personal property. From a verdict and judgment in favor of defendant, plaintiff prosecutes error.

Plaintiff claims the right to the possession of the property by virtue of a chattel mortgage given by the defendant to one Henry Schneider, and by the latter assigned to the plaintiff. It appears from the record that on December 19, 1888, defendant, being the owner of the property in dispute, executed a chattel mortgage thereon to Henry Schneider, to secure the payment of a promissory note calling for \$500, payable September 1, 1889. The execution of the note and mortgage is admitted. The defendant,

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Roberson v. Belter.

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however, insists that he never delivered them, or authorized their delivery, to the payee and mortgagee, but the same were placed in the hands of one George H. Grubb, to be held by him as escrow; and that subsequently, without the knowledge or consent of the defendant, the note and mortgage were turned over by Grubb to Schneider, without the terms and conditions upon which they were held having been complied with. This is disputed by the plaintiff. After the maturity of the note, it, with the mortgage securing the same, was assigned to the plaintiff, without the delivery of either the note or mortgage, for the consideration of \$100. Defendant refusing to surrender the mortgaged property, this action was instituted to recover the possession thereof.

Plaintiff contends that the verdict should have been in his favor, and that the trial court erred in not so directing the jury. We are unable to adopt this view of the case. It is undisputed that one Henry Schneider was the owner of an undivided one-half interest in a brewery, situated near the town of Indianola, which was incumbered by mortgage to the amount of \$1,500. He entered into a contract for the sale of his interest in the brewery, and the personal property contained therein, to the defendant, and the note and chattel mortgage involved in this suit were executed to secure the payment of the purchase price, and the same were deposited in escrow with George H. Grubb, an attorney of Indianola, to be delivered to Schneider on the performance by the latter of certain conditions as specified in such contract. There is a direct conflict in the testimony as to the terms under which the note and mortgage were held by Mr. Grubb, and whether the same were delivered to Schneider by the custodian in violation of the stipulations of the agreement.

The defendant testified unequivocally that the agreement between all the parties was that the note and mortgage were to be placed in the possession of Mr. Grubb, to be

held until Mr. Schneider should procure a release of the incumbrance upon the brewery, and that likewise the latter execute to defendant a warranty deed covering the brewery property, which conveyance was to be left with Mr. Grubb, who was to retain all the papers until both parties were satisfied that the conditions of the sale had been complied with, when the deed was to be delivered to the defendant, and the note and chattel mortgage to Mr. Schneider; that shortly after the execution and delivery of the note and mortgage to Mr. Grubb, the latter, on the execution and delivery to him of said deed, unknown to defendant, surrendered the note and mortgage to Mr. Schneider, without the fulfillment by him of the said stipulations of the contract. That the incumbrance upon the brewery has never been paid or released of record, is conceded.

The defendant is fully corroborated as to the terms of the sale by the testimony of one Charles H. Oman, who was called by the parties to witness the verbal agreement. The evidence of the defendant and Oman is disputed by the testimony of Henry Schneider, who denies under oath that he agreed to lift the mortgage on the brewery, but testifies that Reiter, as a part of the consideration, assumed and agreed to pay the same. This evidence is weakened by the deed executed by him, the same containing full covenants of warranty, without any mention therein that the grantee assumed the payment of the mortgage on the property, as it doubtless would have stipulated if such had been the understanding of the parties. The jury were the judges of the weight to be given to the conflicting testimony, and after a careful perusal of the evidence contained in the bill of exceptions, we are satisfied that they were justified in finding that the contract was as testified by the defendant and his witnesses, and that the note and chattel mortgage were delivered to Schneider by the custodian without authority and in violation of the conditions of the contract. They, therefore, have no validity.

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Roberson v. Relter.

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The rule is that where a mortgage is signed and deposited in escrow with a third person to be delivered to the mortgagee on the performance by the latter of certain conditions, the delivery by the custodian to the mortgagee, without the knowledge or consent of the mortgagor, and without the fulfillment of the conditions precedent by the mortgagee, will not have the effect to confer any interest in the mortgaged property upon the latter or his assignee with notice. The proposition is too well sustained by the adjudicated cases to require the citation of authorities to sustain it.

Plaintiff lays considerable stress upon the fact that the defendant wrote Schneider in the latter part of July, 1889, that he would pay \$250 on the note on August 1, and the balance when due, requesting that the latter send the note to the bank or some person in Indianola that he might see the credit indorsed thereon when the payment was made. This letter, unexplained, would be held to be a recognition by the defendant of Schneider's possession of the note as valid, but in view of other testimony in the record it should not be so regarded. The defendant explains why the letter was sent. He testifies that he wrote it under the advice of counsel in order to prevent the payee from transferring the note to an innocent party before the maturity thereof. There is evidence in the record tending to show that the defendant never recognized the validity of the deed to the brewery, and that he never took possession of the property. Plaintiff was in no way deceived by this letter. It does not appear that he had any knowledge of its contents until after the bringing of the suit. Nor is plaintiff an innocent purchaser, he having taken an assignment of the note and mortgage long after the same fell due, with notice that the defendant disputed their validity. He was aware at the time he was purchasing a lawsuit.

Plaintiff in his brief cites authorities in support of the proposition that where the existence of a chattel mortgage is admitted, and there is a default in payment of the debt

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Roberson v. Relter.

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which it was given to secure, the mortgagee is entitled to the possession of the property, unless the defendant establishes payment or satisfaction of the mortgage debt. The decisions have no application to this case. If the delivery of the note and mortgage was unauthorized, as the proofs tend to establish, and the jury by their verdict so found, then the instruments never had any legal existence, which is a complete defense to an action for the recovery of the possession of the property.

We observe no error in the admission of the testimony regarding the incumbrance on the brewery, since the payment thereof was one of the conditions to be performed by Schneider before the note and mortgage were to be delivered to him. It was certainly competent to prove that this was one of the terms upon which the papers were left in the hands of Grubb, and that the grantee in the deed never paid the incumbrance upon the real estate therein described. The evidence was pertinent and proper for the purpose of showing that the delivery of the note and chattel mortgage by the depository in escrow was fraudulent and void. Plaintiff is mistaken in supposing that the defense in the case at bar is in the nature of a set-off or counter-claim. No such a defense was raised or attempted to be interposed here. If the chattel mortgage ever had any legal existence, and the defendant had paid the incumbrance on the brewery, and set up the breach of the covenants in the deed against incumbrances to defeat plaintiff's action, then there would be some ground for plaintiff's contention that neither offset nor counter-claim is available in an action of replevin. The defense interposed goes to the right of the plaintiff to maintain his suit. If the note and mortgage were invalid, plaintiff was not entitled to the possession of the property. That is plain.

Error is assigned in admitting the testimony of the witness Oman. This is the person who was called by the parties for the purpose of being a witness to the bargain.

The conversation between Schneider and Reiter in the presence of Oman was part in English and part in German. The witness did not understand what they said in German. He testified to what was spoken in English. The objection to his testimony is that, as the witness did not know what was said in German, it was error to permit him to state any part of the conversation. The rule that a witness must give the whole of a conversation, and not a part, should not apply here, as there is not a particle of evidence to show that any portion of the contract was made in a foreign language; while, on the other hand, the presumption is strong that it was not so made, inasmuch as Mr. Oman was called for the express purpose of being a witness to the contract, and it was known to both parties that he had no knowledge of the German language.

There was no error in admitting the testimony of Henry Crabtree as to the value of the property taken under the replevin writ. He showed himself acquainted with the value of the property, and competent to testify upon that subject.

Objection is made to the giving of the following instruction asked by the defendant :

“ 4. An assignee of a promissory note and chattel mortgage, who takes them after maturity, is supposed to have notice of any defense that exists against them, and such defense may be made as effectually against the note and mortgage in the hands of such assignee or holder as if the suit had been brought by the original payee or holder of said note and mortgage.”

The foregoing correctly stated the law, and was applicable to the case made by the evidence. The court did not err in giving the same, or in refusing to instruct the jury as requested by the plaintiff. The most of the instructions asked by the plaintiff were, in effect, that the jury should return a verdict in his favor, and the others were not based upon any issue in the case.

The judgment is erroneous in that it was not in the alternative, for a return of the property, or its value in case it cannot be returned, but was rendered for money absolutely. It has been repeatedly held by this court that where, in an action of replevin, the property has been taken under the writ and delivered to the plaintiff, in case of a verdict in the defendant's favor, the judgment must be in the alternative form. (*Hooker v. Hammill*, 7 Neb., 231; *Lee v. Hastings*, 13 Neb., 508; *Singer Mfg. Co. v. Dunham*, 33 Neb., 686; *Manker v. Sine*, 35 Neb., 746.)

Defendant insists that there is no error in not rendering an alternative judgment, for the reason that the record shows that the plaintiff could not return the property to the defendant if he so desired. It does appear that one of the mules died before the trial in the court below, but it is not shown that the rest of the property replevied cannot be returned. It was advertised and sold under the mortgage, but who became the purchaser is not disclosed by the record.

Again, it is urged that the error in the form of the judgment cannot avail the plaintiff because the attention of the court below was not called to the defect in the motion for a new trial. We are unwilling to adopt that view. A defect in judgment need not be pointed out in a motion for a new trial. Indeed, the filing of such a motion usually, and very properly, precedes the rendition of the judgment, and it could not be known in advance, at the time the motion is presented, that there will be errors, irregularities, or defects made in the rendition of the judgment. The decision in *Armstrong v. Lynch*, 29 Neb., 87, has no application to the question under consideration. In that case there was a defect in the form of the verdict in replevin, the jury having found the value of the property taken by the sheriff under writs of attachment, but not the special interest of the officer. No objection was made as to the form of the verdict in the motion for a new trial, and judgment having been rendered in favor of the sheriff for the actual

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Wilson v. Roberts.

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amount due upon the writs, it was held that the judgment would not be reversed for such defect in the verdict.

In *Manker v. Sine, supra*, it was held, in a case similar to the one at bar, that where a judgment in favor of the defendant in an action of replevin is not in the alternative form, a new trial will not be granted for that reason, but that the cause will be remanded to the trial court to render the proper judgment upon the verdict of the jury; and this case will take that course. The judgment is reversed and remanded, with instructions to the district court to enter judgment in the alternative for a return of the property or the value thereof, in case no return can be had.

REVERSED AND REMANDED.

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MORRIS WILSON, APPELLEE, V. JOHN ROBERTS, APPELLANT.

FILED NOVEMBER 8, 1893. No. 5891.

**Review in Trial Court: WAIVER OF RIGHT TO APPEAL.** Where, in an equitable proceeding, the unsuccessful party secures a re-examination by the district court of the questions at issue, upon an application in the nature of a bill of review, although by motion, instead of a petition, he will be held to have waived his right to appeal from such decree.

MOTION by appellee to dismiss appeal from the district court of Lancaster county. Heard below before TIBBETS, J. *Motion sustained.*

*Halleck F. Rose*, for the motion.

*Samuel J. Tuttle*, contra.

Post, J.

This was a proceeding in equity for the purpose of stating an account between the parties who had been engaged as partners under a contract with the state in removing the boilers and heating apparatus from the basement of the capitol building, and resetting them in the building now used as an engine house. A decree was entered by the district court on the 23d day of November, 1891, in which an account was stated between the parties, and a judgment entered for the plaintiff in the sum of \$385 and costs, being the balance found in his favor.

On the 9th day of December following, the defendant filed a motion to modify the judgment aforesaid, of which the following is a copy :

“Comes now the said defendant, John Roberts, and moves the court herein to vacate and modify the judgment heretofore entered in the above entitled cause, to correct and allow defendant for the several matters and things hereinafter particularly specified, as shown by the several items and vouchers hereto attached and made a part hereof.”

The items and vouchers referred to in the motion do not appear from the transcript, but it is asserted by the defendant that they relate exclusively to matters within the issues presented by the pleadings and considered by the court on the former hearing of the case. On the 18th day of June, 1892, an order was made sustaining the above motion, the record thereof being as follows :

“MORRIS WILSON }  
                  v. }  
JOHN ROBERTS. }

“Now on this day came the parties hereto with their attorneys, and this cause now comes on to be heard upon the motion of the defendant to modify the decree heretofore entered herein, and the court on due consideration whereof does sustain said motion to modify the judgment and de-

cree heretofore entered herein, and it is by the court ordered that the judgment and decree entered herein on the 23d day of November, 1891, and of record at page 549 of Court Journal X of the records of this court, be and the same is hereby modified to the extent that a judgment be entered herein as of this date, in favor of the plaintiff and against the defendant, for the sum of \$362.25, instead of the sum of \$385, as in said former decree so modified to stand. To all of which the plaintiff and defendant duly and severally except, and forty days from the rising of the court are hereby given each of them to reduce their exceptions to writing."

The appeal was taken December 19, 1892. The plaintiff now moves to dismiss the appeal on the ground that it was not taken within the time prescribed by law, and that this court is without jurisdiction of the action. It is evident that the appeal should be dismissed unless, as contended by defendant, the six months allowed therefor should be reckoned from the modification of the judgment instead of the date of the original decree.

It should be remarked in this connection that the plaintiff objected to the consideration of the motion to modify because it was in effect a proceeding to review the original decree and to correct errors occurring at the trial. It is apparent from the record that the object of the motion was to secure a review of the original decree by the district court.

By his election to review the decree in the district court the defendant must be held to have waived his right to an appeal therefrom. Such is the settled and salutary rule, and one sanctioned by abundant authority. (See *Indiana Mutual Fire Ins. Co. v. Routledge*, 7 Ind., 25; *Harvey v. Fink*, 111 Ind., 249; *Commonwealth v. Masonic Temple Co.*, 87 Ky., 349; Elliott, App. Proc., sec. 149.)

The question of the right of appeal from the order modifying the decree is not presented by the record, since the

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Upton v. Cady.

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judgment complained of is evidently the one rendered November 23, 1891, as subsequently modified. The modification thereof was in the defendant's interest, and made upon his motion, and of which he will not now be heard to complain. The question of the regularity of the proceeding to review upon motion of the defendant is not material in view of the conclusion announced above. The motion to dismiss is sustained.

APPEAL DISMISSED.

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MAY A. UPTON V. HENRY J. CADY ET AL.

FILED NOVEMBER 8, 1893. No. 5950.

1. **Review on Error: MOTION FOR NEW TRIAL: ASSIGNMENTS OF ERROR.** One who desires to have reviewed, upon petition in error in this court, alleged errors occurring at the trial, is required to assign the rulings complained of to the trial court in a motion for a new trial.
2. **Error Proceedings: FAILURE TO ASSIGN ERRORS: DISMISSAL.** The failure to assign alleged errors as grounds for a new trial is not of itself sufficient reason for the dismissing of a petition in error by this court.
3. ———: ———: ———: **PRACTICE.** But whenever it appears, from an inspection of the record in any cause, that the petition in error presents no question of law or fact for review by this court, such cause will be considered as submitted on its merits and the judgment or decree affirmed.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*De France & Richardson*, for plaintiff in error.

*Wharton & Baird*, contra.

38	209
48	615
88	209
47	2

Post, J.

On the 15th day of May, 1891, the defendants in error commenced an action in the district court of Douglas county against the plaintiff in error, May A. Upton, and husband, to foreclose a mechanic's lien. The Patrick Land Company, which claimed an interest in the property described in the petition, was also made a defendant.

The plaintiff herein, Mrs. Upton, answered alleging ownership of the property and denying the other allegations of the petition. The Patrick Land Company filed an answer, in which it put in issue the cause of action alleged in the petition, set up a mortgage on the property executed by Mrs. Upton and husband, and prayed for a decree of foreclosure. On the 23d day of January, 1892, a final decree was entered directing the sale of the property in controversy for the satisfaction, first, of the lien of the plaintiffs below; and, second, the mortgage of the Patrick Land Company. On the 20th day of January, 1893, Mrs. Upton filed a petition in error in this court by which she seeks a reversal of the decree of the district court on the following grounds:

1. The court erred in admitting the evidence of C. P. Simmons to which plaintiffs at the time objected.

2. The finding and decree are not sustained by the evidence.

3. The judgment and decree are contrary to the law and the evidence.

We are now asked to dismiss the petition in error for the reason that the alleged errors were not called to the attention of the district court by means of a motion for a new trial. It has been repeatedly held that where the unsuccessful party desires to have reviewed, by petition in error in this court, alleged errors occurring at the trial, he is required to assign the rulings complained of in a motion for a new trial. (See *Hosford v. Stone*, 6 Neb., 380; *Cruts v. Wray*, 19 Neb.,

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May v. State.

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581 ; *Gaughran v. Crosby*, 33 Neb., 33.) In the last named case it was held that the failure to file a motion for a new trial is not of itself sufficient reason for dismissing a petition in error. While we adhere to that rule we will not willingly apply it where the natural and only effect thereof will be to delay the disposition of a cause which from an inspection of the record we have seen to be without merit. It is apparent, from a careful examination of the record upon the consideration of the motion to dismiss, that the decree of the district court must be affirmed for the reasons stated. We have therefore regarded the cause as submitted upon its merits and the decree is

AFFIRMED.

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MARK MAY V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1893. No. 5836.

38	211
56	500

1. **Criminal Law: REVIEW.** Where it is apparent that the plaintiff in error has not been prejudiced by the ruling complained of, the judgment will be affirmed, and this court will not examine the record for the purpose of determining whether or not such ruling is technically correct.
2. ———: **CONTINUANCE: FAILURE TO NOTIFY DEFENDANT'S ATTORNEY OF TRIAL.** A motion for continuance in a criminal case on the ground that the attorney for the accused had not been notified of the trial a sufficient length of time to properly prepare therefor, but which fails to show want of notice by the accused himself, is insufficient.
3. ———: **LARCENY: CONFESSIONS EXTORTED BY THREATS: ADMISSIBILITY.** Confessions of the accused in a criminal prosecution are inadmissible where there is reasonable ground for the presumption that they were extorted by threats or induced by means of promises.
4. ———: ———: **EVIDENCE** examined, and *held* sufficient to sustain the judgment of the district court.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

*Silas Cobb*, for plaintiff in error.

*George H. Hastings*, Attorney General, and *T. J. Mahoney*, for the state.

Post, J.

This is a petition in error from the district court of Douglas county, and brings up for review the judgment of that court, whereby the plaintiff in error was convicted of the crime of larceny, and sentenced to a term in the penitentiary.

1. The first of the alleged errors necessary to notice is the overruling of the motion for a continuance. The grounds upon which the continuance was asked by the prisoner are: First. Absence of witnesses by whom he could prove that William Hayden, a member of the firm of Hayden Bros., who are named in the information as owners of the property alleged to have been stolen, had admitted that he, the prisoner, was the representative of said firm, and authorized to purchase goods in their name. It is sufficient to say that on the trial the prisoner testified that he was, at the time of the alleged larceny, employed as superintendent or foreman of the notion department of Hayden Bros.' store, in the city of Omaha, and was in the habit of purchasing goods when required by the business of the firm. On that point he was not contradicted by William Hayden, who testified as a witness for the state. On the other hand, the testimony of the witness named is strongly corroborative of the prisoner. It is clear that the statements imputed to Hayden, and which could have been proved by the absent witnesses, were in no sense contradictory of his evidence at the trial, and would, for that reason, have been inadmissible if offered. Second. That the prisoner's attor-

ney had not been notified when the case would be reached, until a few hours before it was called for trial. On that point the affidavit is insufficient, since it fails to show that the prisoner himself was not aware of the date set for the trial a sufficient length of time to make preparation therefor. Nor is it apparent, from an examination of the bill of exceptions, that he has been prejudiced by being required to go to trial without sufficient notice, since he had the benefit of a very able and skillful defense. It is doubtful, in fact, if a better presentation of the case in his favor could have been made under any circumstances. There was, therefore, no error in the overruling of the motion for a continuance of which the prisoner can now complain.

2. The next day, and after the selection of a jury had been begun, time was asked to prepare a second motion for a continuance, which was refused. Said application, according to the transcript, was based upon the information contained in a telegram sent by the prisoner's sister from Chicago the day previous. The telegram does not appear in the record; hence we are unable to say that there was an abuse of discretion by the court in denying the application.

3. The next assignment relates to the admission in evidence of certain confessions by the prisoner, claimed to have been made to William and Joseph Hayden. The ground of the objection stated is that said confessions were not voluntary, and appear from the record to have been made to persons in authority over the prisoner. This contention is not sustained by the record. The prisoner, according to the testimony of the witnesses named, on being confronted with proof of guilt in the form of letters indicating that he had for some time been engaged in disposing of goods from the store, on his own account, to parties in Chicago and New York, also with the property described in the information, to-wit, a quantity of silk elastic web belonging to his employers, which he had recently delivered to

the American Express Company consigned to a party in Chicago, broke down and confessed the theft charged, as well as others, and offered to make restitution. Although the witnesses were not asked either on direct or cross-examination whether any threats or promises were made as an inducement to the confession, it is clear that the statement of the accused was entirely voluntary. It is true that he testifies on his direct examination that on the Saturday preceding his arrest, which was on the following Monday, in a conversation with William Hayden concerning the larceny charged, the latter said to him: "This is crooked work. I want you to tell the truth about it. It will be better for you, for we know you are doing crooked work. I will have you arrested and have an officer ready outside the door." But he explicitly denies the confession proved. It is also in evidence that he voluntarily returned to the store the next day, where he had a further conversation with the proprietors on the subject, and again on Monday, where he remained until late in the afternoon when he was taken into custody. The rule which excludes evidence of confessions whenever there is reasonable ground for the presumption that they were extorted by threats or induced by promise of immunity, is one of great antiquity, and rests upon the soundest reasons. But in determining whether the confession offered is admissible, the test is whether the threat or promise shown is in any degree calculated to influence the accused. (See 3 Russell, Crimes [9th ed.], 367.) Tested by that rule the confession in this case was admissible, and the district court did not err in receiving it in evidence.

4. Exception is taken to the refusing of instruction No. 1 requested by the prisoner, which correctly states the rule with respect to the presumption of innocence in his favor, and the facts which the state was required to establish in order to be entitled to a conviction. The court had, however, given the same proposition in substance; hence the refusal of the request was not error.

5. It is urged finally that the evidence is insufficient to sustain the judgment. In that view we cannot concur. The proof clearly establishes the fact that the prisoner at the time charged, while employed by the firm above named, packed in a box a large quantity of silk elastic web, the property of his employers, and caused it to be delivered to the express company, consigned to A. Stein & Co., Chicago, from whence it was recovered by the owners. That his intention was to dispose of the property in question on his own account, will, under the circumstances of the case, scarcely admit of a doubt. Among other things which indicate a felonious intention on the part of the prisoner, is the fact that the explanation given by him of the transaction is unreasonable and apparently false, while there is evidence strongly tending to prove the conversion of property at other times by disposing of it in like manner, on his own account, to parties in Chicago and New York. We can see no ground for interference with the verdict of the jury, as the evidence is clearly sufficient to sustain the judgment.

There are other questions discussed in the brief of plaintiff in error, but as they were not presented by the motion for a new trial, they do not call for notice at this time. The judgment of the district court is

AFFIRMED.

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HANS P. LAU V. W. B. GRIMES DRY GOODS COMPANY  
ET AL.

FILED NOVEMBER 8, 1893. No. 4870.

1. **Briefs:** MISCONDUCT OF ATTORNEYS: INSINUATIONS AND IMPUTATIONS OF UNFAIRNESS and improper motives to the trial judge are highly improper and prejudicial to the party making them.

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Lau v. Grimes Dry Goods Co.

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2. **Instructions: AUTHORITY OF ATTORNEY TO BIND HIS CLIENT.**  
Where the question at issue was whether an alleged agreement had been made in a case pending, by an attorney of record for one of the parties, there being no controversy with respect to the extent of his authority, it is not error to refuse an instruction defining the power of an attorney to contract in the name of his principal.
3. ———. The trial court is not required to charge the jury in the exact language requested. It is sufficient if the substance of an instruction be given.
4. **Review: HARMLESS ERROR.** A judgment will not be reversed on account of errors not prejudicial to the complaining party.
5. **Evidence of value examined, and held sufficient to sustain the judgment of the district court.**
6. **Attachment: LIABILITY OF GARNISHEE: UNSATISFACTORY DISCLOSURE.** In an attachment suit it was stipulated that L., a garnishee, who had taken possession of a stock of goods to satisfy a mortgage executed by the defendant, should answer by affidavit "showing fully the amount of money remaining in his hands from sale of stock formerly belonging to the defendant," and that upon the payment of said money into court, less the amount of his mortgage and expenses, the garnishee should be discharged. *Held*, No defense in an action by the plaintiff against the garnishee after answer for an unsatisfactory disclosure, the cause of action alleged being the conversion of the stock of goods while in his possession.

ERROR from the district court of Fillmore county.  
Tried below before MORRIS, J.

*E. P. Holmes*, for plaintiff in error.

*Edgar C. Ellis, M. H. Weiss, and Chas. P. Schwer*, contra.

POST, J.

This was an action in the district court of Fillmore county by the defendant in error, The W. B. Grimes Dry Goods Company, against the plaintiff in error under the provisions of section 225 of the Code, for an unsatisfactory disclosure as garnishee.

The other defendants in error, thirteen in number, were intervenors who each claimed an interest in the property adverse to the defendant below. It appears from the record of the case that for some time prior to October 15, 1888, Wm. Schultz & Son had been doing business as general merchants in the village of Strang in said county. That on the day named said parties executed in favor of Lau, the plaintiff in error, a mortgage on their entire stock of merchandise to secure a note of that date of \$1,086.89, and suffered the mortgagee to take immediate possession of the property so conveyed. Shortly thereafter The Grimes Dry Goods Company commenced an action against Schultz & Son in the district court of said county, and caused an order of attachment to issue therein, by virtue of which the property in controversy was seized while in possession of the plaintiff in error. The latter subsequently recovered possession of the property by means of an action of replevin against the sheriff, and proceeded to sell it in order to satisfy his mortgage. Some time after he had recovered possession of the property by his action against the sheriff, The Grimes Dry Goods Company and other creditors of Schultz & Son instituted garnishment proceedings against him as a supposed debtor of the latter. The several attachment suits were consolidated to the extent that by agreement a single answer was filed by the garnishee, in which he says: "There is now in his hands belonging to said defendants (Schultz & Son), subject to the liens by mortgages and orders of garnishment, the sum of \$2,812.68; and that with this answer affiant hands into this court the said sum of \$2,812.68, subject to the orders of said court hereafter to be made. Affiant further says that said amount is all of the property, moneys, or credits of any nature whatsoever now in his hands belonging to the said defendants, and that since the orders of garnishment were served upon this affiant he has not in any manner paid to the said Schultz & Son any part of the money in his hands, and that the amount

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Lau v. Grimes Dry Goods Co.

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of money in his hands, and that the amount of money now handed to the court is all of the money belonging to the defendants."

In the petition below, after stating its cause of action against Schultz & Son, which had in the meantime been reduced to judgment, The Grimes Dry Goods Company alleges the filing of the answer set out above, and charges that said answer is not true, and is not a full disclosure of the indebtedness of the garnishee to Schultz & Son. It is further charged that at the time he was served with notice said garnishee had in his possession belonging to Schultz & Son money to the amount of \$4,000 and the stock of merchandise above mentioned of the value of \$9,000, all of which he has converted to his own use.

In his answer the plaintiff in error admits that he had in his possession when served as garnishee the stock of goods belonging to Schultz & Son, and that he at said time held the property in controversy by virtue of the aforesaid mortgage in his favor, but denies that said property was of the value of \$9,000, and avers that the value thereof was \$4,533.91, and no more. He admits that said property had been disposed of by him at private sale, and avers that it was so disposed of under and by virtue of an agreement with the plaintiff below and the several garnishees. He alleges that the stock of goods in controversy was sold to the best possible advantage, and in such manner as would insure the largest and best price, but that they were old and shop-worn, and worth only the sum above named; and that after paying the amount due by virtue of the mortgage in his favor and his actual and necessary expenses in the premises, he had paid into court the balance remaining, to-wit, \$2,812.68. He also alleges that previous to the filing of his answer as garnishee he entered into a written stipulation with the plaintiff by which it was agreed that he should be discharged upon paying into court the money then remaining in his hands after satisfying his

mortgage and costs of sale. The stipulation referred to above is as follows:

“In District Court of Fillmore county.

“BARBE BROS. }

v. }

SHULTZ & SON. }

“PAXTON & GALLAGHER }

v. }

SHULTZ & SON. }

“W. B. GRIMES DRY GOODS CO. }

v. }

SHULTZ & SON. }

“ROBERT KRAUS }

v. }

SHULTZ & SON. }

“It is hereby stipulated and agreed by and between the parties to the above entitled causes, and each of them, that answer of garnishee, Hans P. Lau, in open court is waived and consent given him to answer by June 4, 1889, by affidavit, showing fully the amount of money remaining in his hands from sale of stock of goods formerly belonging to Shultz & Son.

“2. That the amount of said sums of money, less the amount of Lau’s note and mortgage thereon and expenses of foreclosure, be by him paid into court to await the further order.

“3. That upon the payment of said money into court, the garnishee be dismissed.

H. F. ROSE,

“For H. P. Lau, garnishee.

“W. C. SLOAN,

“Att’y for all the above plaintiffs.”

The issues presented by the petition of the intervenors and answers thereto are substantially the same as above. At the trial it was stipulated as follows:

“It is stipulated by the parties that the issues, so far as this trial is concerned, to be submitted to the jury here, are the following questions:

"1. Was the sale of the merchandise made prior to the advertised day of such sale of goods and merchandise held by the defendant Lau under his mortgage, made under an agreement with the plaintiff?

"2. Was the sale of the merchandise, made prior to the advertised day of such sale of the goods and merchandise held by defendant Lau under his mortgage, made under any agreement with the intervenors herein?

"3. What was the fair and reasonable value of the stock of merchandise of Shultz & Son at the time the same was taken possession of by the defendant Lau, to-wit, October 19, 1888?

"The finding of these facts is to be taken in no way as intended to admit the claims of any of these defendants, but for the purpose of this trial, of the facts submitted to the jury, these claims will be taken to be admitted as represented in their pleadings. This agreement is not intended in any way to hamper or interfere with the parties in this action which they may find arise under the pleadings which shall be submitted to the court in this case, if any such there be.

"As to any other questions of fact other than these submitted to the jury here, a jury is waived and they will be submitted to the court."

The first and second of the above interrogatories were answered by the jury in the negative, and in response to the third, the stock of merchandise was found to have been worth \$6,650 at the time the defendant below took possession thereof.

The first errors assigned relate to the overruling of the motion to set aside the above findings. The general charge of the court is violently assailed by the plaintiff in error as "meaningless," "unintelligible," and evidence of prejudice in the mind of the trial judge, etc. This practice has been frequently commented upon and always condemned. Criticisms and insinuations of the character un-

der consideration are always out of place in the argument of a lawyer, and, as said in a recent case in this court, are in the nature of an admission that the party making them, for reasons best known to himself, is not willing to rely upon the merits of his case. (See *Flannagan v. Elton*, 34 Neb., 355.) But as much as such a practice is to be deplored as a rule, it is doubly censurable in a case like this, where, after carefully considering the lengthy charge copied in plaintiff in error's brief, we discover, on examining the record, that no exception was taken thereto, either at the time or in the motion for a new trial. We certainly have a right to expect fairness and candor on the part of attorneys who practice in this court, and to assume when considering the questions argued in their briefs that the discussion therein is pertinent to some question presented by the record. In this case we have failed to discover in the charge of the court any prejudicial error; but suppose it to be justly subject to criticism, it was evidently satisfactory to the plaintiff in error when given, and he will not now be heard to complain.

The court refused to give the following instruction asked by the plaintiff in error, to which exception was taken:

"You are further instructed that if you find from the evidence that the plaintiff in this case, together with the intervenors, entered into an agreement with the defendant, by and through their duly employed attorneys, then, and in that case, you are instructed that the attorneys for said parties had the authority, by virtue of their employment as such, to do in behalf of their clients all acts in or out of court necessary or identical to the prosecution and management of the matter of the business entrusted to said attorneys by such clients, and they will be bound thereby; and you are further instructed that it is a general rule of law, that in the absence of fraud a client is bound by the acts of his attorney in all matters pertaining to the business entrusted to his care or management."

There is no error in the ruling complained of. No issue was involved with respect to the power of an attorney to bind his client by agreements within the scope of his authority. The request, it may be assumed, embodies a sound proposition of law and might have been given without prejudice to the rights of the adverse party, although it is a rule well settled in this jurisdiction that instructions should have special reference to the evidence, and that it is error to leave the jury at liberty to infer a fact of which there is no proof. (*Cropsey v. Averill*, 8 Neb., 152; *City of York v. Spellman*, 19 Neb., 357.) Had there been a controversy with respect to the authority of the attorney to stipulate for the disposal of the stock of goods at private sale, the refusal of the instruction would have presented a different question. But since the question at issue was the execution of the agreement rather than the authority to make it, we are unable to perceive wherein the plaintiff in error is prejudiced.

It is next argued that the court erred in refusing the following instruction:

“You are further instructed that in arriving at the value of said stock here in controversy you will not go out of the evidence to ascertain the same, or speculate as to what the value of the same might have been, but your answer to such question, fixing the value thereof, must be based upon the evidence now before you; and in arriving at such value from the evidence in this case, you are instructed that it is your duty to find what the fair and reasonable value of such stock was at the time of its passing into the hands of said defendant, to-wit, on the 19th day of October, 1888, in the market in which said stock was located, to-wit, Strang, Nebraska, and you will not allow yourself to be misled or confused with any testimony that may have been introduced in this case concerning a market value, or invoice price, that might have been at some time attached to or made of said stock.”

This paragraph, so far as it states the general rule, had been given in substance in the general charge of the court. The last clause is apparently intended to disparage the testimony of the witnesses for the defendant in error, Stewart and Houchin, who participated in the appraisement of the goods at the time they were taken from the sheriff in the replevin suit. Each of these witnesses on direct examination testified that the value of the goods was a little less than \$8,000, about \$7,800. On their cross-examination it was disclosed that four persons participated in the inventory and appraisement, each of whom listed different parts of the stock with the value of the items thereof, upon which all agreed; that the separate lists were copied the next day, making the complete inventory, and the values footed up showing a total of \$7,800. The inventory was not offered in evidence by the plaintiff below, nor is it claimed to be independent evidence of the value of the stock of goods. It would probably have been inadmissible if offered for that purpose, but was a proper subject of inquiry on cross-examination as tending to show the witnesses' means of knowledge. The fact that the value given by the witnesses corresponds substantially with the appraisement is at most a corroborating circumstance not liable to "confuse" or "mislead" the jury or obscure the real question at issue. The ruling of the court in refusing the instruction, therefore, if erroneous, is error without prejudice.

The next assignment in the motion is that the third finding is contrary to the evidence. The evidence is conflicting. The witnesses for defendant in error, who are shown to be experienced merchants and salesmen, testify that the stock of goods was worth \$7,800, while some of the witnesses for the plaintiff in error place their value as low as \$4,500. The value as found, \$6,600, is not so clearly against the weight of the evidence as to call for reversal in this proceeding. The jury were as capable of weighing

the evidence and determining therefrom the value of the property as we are, and their finding should not be disturbed.

The district court having refused to set aside the special findings, proceeded in accordance with the stipulation to receive evidence offered by the intervenors tending to prove their respective claims as against Shultz & Son, and to establish their rights to share in the proceeds of the property in controversy. That hearing resulted in a finding and judgment for the plaintiff below in the sum of \$3,404.35, being the value of the stock of goods less the amount of the mortgage, \$1,086.89, and the amount of money paid into court by the plaintiff in error, \$2,812.68, with interest.

Subsequently a formal motion for a new trial was made by the plaintiff in error which presents certain questions in addition to those already considered. It is contended that the stipulation first set out amounts to a waiver by the defendant in error of his right to proceed against the garnishee under the Code, and is a complete defense to this action. It will be observed that the stipulation relied upon was made with reference to, and filed in, the attachment suit before this action was commenced, and before this cause of action had accrued. The garnishee was thereby authorized to answer by affidavit "showing fully" the amount of money remaining in his hands, etc., and not otherwise. There is nothing therein to warrant the inference that the parties contemplated a disposition of the goods otherwise than at public auction, after due and legal notice. And when it is read in the light of the facts found by the jury it is certain that in disposing of the greater part of them at private sale he acted without authority. It is clear, too, that such act amounted to a conversion of the property so disposed of. He was required to make true disclosure under oath (sec. 221 of the Code), and this obligation was neither restricted nor enlarged by the stipulation. The proceeding against the plaintiff in error as garnishee was in

the nature of an action by Shultz & Son for the use of the plaintiff therein, The Grimes Dry Goods Company. That he is liable to them or others who have succeeded to their rights for the value of the goods will not be seriously questioned. Nor is there any sound reason for holding that the defendant in error is now estopped by the terms of the agreement in question to controvert his answer and disclosure as garnishee.

There is a further contention, viz., that the judgment is excessive. It is true the judgment of the defendant in error against Shultz & Son is but \$1,040, and costs taxed at \$42.63. But it is true that it had previously been agreed between the several intervenors that they should share *pro rata* in the proceeds of the stock of goods. It is also true that they were all before the court, and are concluded by the judgment with which they are satisfied. Had objection been interposed by them the district court would have determined the rights, as between themselves, of the several parties claiming adversely to the plaintiff in error. According to the record the plaintiff below has a judgment for the exact amount due from the defendant therein to the creditors of Shultz and Son on account of the conversion of the property in controversy. That the proceeds of the judgment remain to be distributed among the beneficiaries thereof in accordance with an agreement between themselves is a fact of which the judgment defendant should not complain. There is no material error in the record and the judgment is

**AFFIRMED.**

## UNION PACIFIC RAILWAY COMPANY V. J. J. PORTER.

FILED NOVEMBER 8, 1893. No. 4948.

38	226
39	614
39	806

38	226
41	587

38	226
44	458

38	226
48	98
148	168
48	640

38	226
54	677

38	226
158	681

38	226
159	694

1. Negligence as ground of recovery or defense is a question of fact to be submitted to the jury upon the evidence as is any other question of fact.
2. Railroad Companies: PASSENGERS: PERSONAL INJURIES: PRESUMPTION OF NEGLIGENCE: NOTICE OF RULES. Under the provisions of sec. 3, art. 1, ch. 72, Comp. Stats., it is only necessary to a right of recovery against a railroad company to show that the person injured was at the time being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that the injury complained of was the result of the violation of some express rule or regulation of said railroad company, actually brought to the notice of the party injured.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

The opinion contains a statement of the case.

*J. M. Thurston, W. R. Kelly, and E. P. Smith*, for plaintiff in error:

The plaintiff below was negligent in not getting off the car while he could safely do so. (*Raben v. Central Ia. R. Co.*, 35 N. W. Rep. [Ia.], 64, and cases cited.)

Plaintiff below was negligent in that, finding the train in motion and going faster than he expected, he stepped from the car onto the platform. Such negligence must bar his recovery in this action. (*Thomas v. Chicago & G. T. R. Co.*, 49 N. W. Rep. [Mich.], 547; *Lake Shore & M. S. R. Co. v. Bangs*, 47 Mich., 470; *Shearman & Redfield, Negligence* [4th ed.], secs. 87, 91; *Filer v. New York C. R.*

Co., 49 N. Y., 55; *Lindsey v. Chicago, R. I. & P. R. Co.*, 20 N. W. Rep. [Ia.], 737; *Kilpatrick v. Pennsylvania R. Co.*, 21 Atl. Rep. [Pa.], 408; Patterson, Railroad Accident Law, p. 72; 2 Am. & Eng. Ency. Law, pp. 762, 763; *Burrows v. Erie R. Co.*, 63 N. Y., 556; *Secor v. Toledo, P. & W. R. Co.*, 10 Fed. Rep., 15; *Ohio & M. R. Co. v. Stratton*, 78 Ill., 88; *Illinois C. R. Co. v. Slatton*, 54 Ill., 137; *Chicago & A. R. Co. v. Randolph*, 53 Ill., 510; *Chicago & N. W. R. Co. v. Scates*, 90 Ill., 586; *Jewell v. Chicago, St. P. & M. R. Co.*, 54 Wis., 610; *Pennsylvania R. Co. v. Aspell*, 23 Pa. St., 147; *Hickey v. Boston & L. R. Co.*, 14 Allen [Mass.], 429; *Davis v. Chicago & N. W. R. Co.*, 18 Wis., 185; *Houston & T. C. R. Co. v. Leslie*, 57 Tex., 83-87; *Reibel v. Cincinnati, I. & St. L. & C. R. Co.*, 17 N. E. Rep. [Ind.], 107; *Illinois C. R. Co. v. Chambers*, 71 Ill., 521; *Illinois C. R. Co. v. Lutz*, 84 Ill., 598; *Morrison v. Erie R. Co.*, 56 N. Y., 302.)

The first instruction given by the court upon its own motion was erroneous. The court assumed that it was sustained by sec. 3, art. 1, ch. 72, Comp. Stats. This statute was originally passed and took effect June 22, 1867. The Union Pacific charter was passed and approved July 1, 1862. Upon the organization and creation of this corporation in 1862, its rights became vested. One cannot conceive of a more important right than that of being protected against any negligence of passengers, when the injury has arisen in a case where the law will not pronounce the corporation itself negligent, or in a case where the negligence of the plaintiff himself contributed to the injury which has, in part, resulted from the negligence of the corporation. The legislature cannot deprive a person or a corporation of a vested right to an existing, material defense. (*Maguiar v. Henry*, 84 Ky., 1; Cooley, Constitutional Limitations [4th ed.], 458; Wharton, Law of Negligence, sec. 421; *Parrot v. Wells, Fargo & Co.*, 15 Wall. [U. S.], 524-538; *Harvey v. Dunlop*, Hill & Denio Supp. [N. Y.], 193.)

Said section 3 is capable of a construction which will harmonize with the well-established rules of common law. The words "as at common law" should be interpolated so that the section would read, "Every railroad company as aforesaid shall be liable as at common law for all damages inflicted upon the person of passengers." Otherwise the legislature must be considered as seeking by adverse legislation to control rights vested in the railroad company under its charter from the government in 1862. (Cooley, Constitutional Law, pp. 74, 76; *Shreveport v. Colc*, 129 U. S., 36; Wharton, Law of Negligence, sec. 44; Sutherland, Statutory Construction, secs. 237, 241; Sedgwick, Statutory & Constitutional Law, p. 50; *Nazro v. Merchants Mutual Ins. Co.*, 14 Wis., 319.)

But if the statute is to be construed as making the company the insurer and the passenger the insured under a non-lapsing policy, premium paid in advance, against almost any injury, though wholly resulting from his own non-criminal negligence, it is in violation of that principle which lies outside of and beyond all written constitutions, and was passed in disregard of fundamental principles of law and justice which it has been held no legislative body can override, even though not prohibited by the written constitution. (*Durkee v. Janesville*, 28 Wis., 464-467; *Calder v. Bull*, 3 Dallas [U. S.], 387-8; *Fletcher v. Peck*, 6 Cranch [U. S.], 143; *Wilkinson v. Leland*, 2 Pet. [U. S.], 656-8; *Terrett v. Taylor*, 9 Cranch [U. S.], 50; *Varick v. Smith*, 5 Paige [N. Y.], 159; *Cincinnati W. & Z. R. Co. v. Commissioners of Clinton County*, 1 O. St., 86; *Cass v. Dillon*, 2 O. St., 628; *Bank of the State v. Cooper*, 2 Yerg. [Tenn.], 603; *Lewis v. Webb*, 3 Greenl. [Me.], 336; *Hughes v. Fond du Lac*, 73 Wis., 382; Tiedeman, Limitations of Police Powers, 598-9; *Ohio & M. R. Co. v. Lackey*, 78 Ill., 55; *Savings Bank v. Ward*, 100 U. S., 204.)

Said statute is in violation of sec. 13, art. 1, of the con-

stitution, providing that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." It discriminates as to both plaintiff and defendant. (*Hincks v. City of Milwaukee*, 46 Wis., 559; *Hughes v. Fond du Lac*, 73 Wis., 380; *Park v. Detroit Free Press Co.*, 40 N. W. Rep. [Mich.], 731; *Potter v. Chicago & N. W. R. Co.*, 21 Wis., 377; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Bull v. Conroe*, 13 Wis., 260; *Holden v. James*, 11 Mass., 396; *Picquet, Appellant*, 5 Pick. [Mass.], 65; *Durham v. Lewiston*, 4 Greenl. [Me.], 140; *Budd v. State*, 3 Humph. [Tenn.], 483; *Wally v. Kennedy*, 2 Yerg. [Tenn.], 554; *Bank of the State v. Cooper*, 2 Yerg. [Tenn.], 599; *Tate v. Bell*, 4 Yerg. [Tenn.], 202; *Officer v. Young*, 5 Yerg. [Tenn.], 320; *Jones v. Perry*, 10 Yerg. [Tenn.], 59; *Simonds v. Simonds*, 103 Mass., 572; *State v. Bartlett*, 35 Wis., 287; *Johnson v. Waukesha County*, 64 Wis., 281; *Daly v. State*, 13 Lea [Tenn.], 228; *In re Frazie*, 63 Mich., 396; *Waite v. Garston*, L. R., 3 Q. B. [Eng.], 5; *Mayor of Alexandria v. Dearmon*, 2 Sneed [Tenn.], 121; *Burkholtz v. State*, 16 Lea [Tenn.], 71; *Woodard v. Brien*, 14 Lea [Tenn.], 520; *City of Memphis v. Fisher*, 9 Bax. [Tenn.], 229; *State v. Duffy*, 7 Nev., 349; *Griffin v. Cunningham*, 20 Gratt. [Va.], 31; *Dorsey v. Dorsey*, 37 Md., 64; *Lawson v. Jeffries*, 47 Miss., 686; *Wilder v. Chicago & W. M. R. Co.*, 70 Mich., 382; *Trustees of Internal Improvement Fund v. Bailey*, 10 Fla., 238; *Arnold v. Kelley*, 5 W. Va., 446; *Atchison & N. R. Co. v. Baty*, 6 Neb., 37.)

The statute is also in violation of sec. 3, art. 1, of the constitution, providing: "No person shall be deprived of life, liberty, or property without due process of law." (*Chaddock v. Day*, 42 N. W. Rep. [Mich.], 977; *Murray v. Hoboken Land & Imp. Co.*, 18 How. [U. S.], 276; *Davidson v. New Orleans*, 96 U. S., 97; *Hurtado v. California*, 110 U. S., 516; *Loan Association v. Topeka*, 20 Wall.

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Union P. R. Co. v. Porter.

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[U. S.], 622; *Turner v. Althaus*, 6 Neb., 54; *Good v. Zercher*, 12 O., 367; *Norman v. Heist*, 5 W. & S. [Pa.], 171; *Denny v. Mattoon*, 2 Allen [Mass.], 361; *Greenough v. Greenough*, 11 Pa. St., 494; *In re Albany Street*, 11 Wend. [N. Y.], 149; *Zeigler v. South & N. A. R. R. Co.*, 58 Ala., 595; *New Orleans & N. E. R. Co. v. Borgeois*, 66 Miss., 3; *Cottrel v. Union P. R. Co.*, 21 Pac. Rep. [Idaho], 416; *Minneapolis & St. L. R. Co. v. Beckwith*, 9 Sup. Ct. Rep. [U. S.], 207; *Cairo & F. R. Co. v. Parks*, 32 Ark., 131; *Bielenberg v. Montana U. R. Co.*, 20 Pac. Rep. [Mont.], 314; *Jensen v. Union P. R. Co.*, 21 Pac. Rep. [Utah], 994; *East Kingston v. Towle*, 48 N. H., 57; *Oregon R. & N. Co. v. Smalley*, 23 Pac. Rep. [Wash.], 1008; *Sullivan v. Oregon R. & M. Co.*, 24 Pac. Rep., [Ore.], 408; *Rorer, Railroads*, 575; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala., 113; *In re City of Buffalo*, 68 N. Y., 173; *Nashville C. & St. L. R. Co. v. Hembree*, 5 So. Rep. [Ala.], 175.)

*Thompson & Oldham, contra:*

If a railroad train stops at a place where there is no platform for the use of passengers in getting on and off trains, the company's employes should assist them in getting off and on or should notify them to alight, and in not so doing they are guilty of negligence. (*Memphis & C. R. Co. v. Whitfield*, 44 Miss., 466.)

The instructions were not erroneous. (Sec. 3, art. 1, ch. 72, Comp. Stats.; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143.)

RYAN, C.

The amended petition in this case alleged the corporate existence of the Union Pacific Railway Company, and that it was operating a line of railroad through Kearney, Nebraska, at the time of the injuries complained of; that on April 29, 1890, plaintiff in said petition purchased a ticket entitling him as a passenger to be transported upon

one of the trains of said railroad company from Grand Island, Nebraska, to the aforesaid station of Kearney on said railway company's line of railroad; that when the train upon which plaintiff had ridden from Grand Island reached Kearney, it was stopped before the car on which plaintiff was located, or any part of the train, had reached the station house or platform of said railway company; that thereupon plaintiff passed out of said car to the platform thereof to alight, thinking he was at the station and platform of the defendant, but finding that said train and coach on which plaintiff stood had not yet arrived at said station and platform, but that said coach was over 300 feet from said platform of the station, and the engine of the defendant was taking water, as plaintiff believed, and there being no platform or place to alight from said car opposite the same, and it being in the night-time and dark, and there being a wind-mill, engine-house, mail catcher, and water tank between where plaintiff then was and the east end of the platform, and plaintiff not being notified by defendant's servants to alight there, plaintiff, standing on the lower step of the car, waited for defendant to pull its train up to said platform and station house so that he might with safety alight from said coach; that said train moved up to the platform but did not stop thereat, and when the coach on which plaintiff stood was opposite said platform, and while said train was moving slowly by said platform, plaintiff believing it was safe to alight therefrom, and being suddenly convinced that defendant was not going to stop its train at said platform, stepped from the lower step of said car upon said platform, and in doing so plaintiff fell on said platform, and in so doing two bones of his leg were broken as a result of said accident. Plaintiff by further averments negatived the existence of any negligence on his own part causing or conducing to the accident and injury aforesaid, and having alleged pain and suffering and disability to practice his vocation as a physician for a

long time, and that permanent disability had been caused him by the aforesaid accident and injury, the plaintiff prayed judgment for \$1,999.99 and costs.

The answer admitted the corporate existence of the defendant, and that at the time of the alleged injury it was operating a railroad, and *seriatim* denied each averment in the plaintiff's petition contained, and alleged that whatever injury plaintiff had suffered was due wholly to his own negligence. There was a reply in denial of all allegations of the answer inconsistent with the averments of the petition.

Upon a trial a verdict was returned in favor of the plaintiff for the sum of \$1,314.49; and, a motion for a new trial having been overruled, judgment was duly rendered for the amount of said verdict.

There was but little evidence as to the manner of the accident, except such as was given by the plaintiff himself. Such evidence as there was, however, is found fully epitomized in the petition above described, and therefore requires no repetition. There was evidence, furthermore, that the railroad train which carried plaintiff from Grand Island to Kearney made no stop at the water tank at the latter place, but that the stop which plaintiff believed was at the water tank was, in fact, made so as to allow the baggage to be unloaded from the baggage car in said train, directly opposite the baggage room of Kearney station. There was undisputed evidence also that the train extended from the baggage coach aforesaid to quite a distance east of the east end of the platform at the Kearney depot, and that the car step upon which plaintiff was standing during the halt of the train was some distance east of the platform and incline at said station. There was a cinder walk along the track opposite to where plaintiff stood during the halt made by the train, upon which walk it would have been possible and safe for plaintiff to have walked to the Kearney depot, had he so chosen to have done. The time at which the

train reached Kearney was about 3 o'clock in the morning, and the sky was clear. There were no lights nearer where plaintiff found himself when the train halted than the depot, where there was a lantern opposite the passenger waiting-room door. The railway company, as plaintiff in error, insists that the defendant in error was negligent in not availing himself of the cinder walk as a means of reaching the depot platform, and that his alighting upon said platform from a moving train was negligence of itself, such as should avoid the verdict. The existence of negligence, as justifying or defeating a right of recovery, is for the jury to determine as it determines any other question of fact. If the jury find negligence as against the defendant, such as to justify a recovery, or find contributory negligence such that a recovery cannot be had, such finding must stand, unless it has no support in the evidence considered, just as must any other essential finding of fact. It is useless, therefore, to urge that the presiding judge is the proper trier of questions of this kind, and that as to such he should find the presence or absence of negligence upon the weight of the testimony, or instruct the jury to find its presence or absence according as a given fact or group of facts shall be proved or disproved. The court can but state to the jury the law applicable to the facts in respect to which evidence has been introduced. It thereupon remains with the jury to determine the existence of the essential facts. If there is no evidence such as the jury should act upon in its province, the court should instruct accordingly, or set aside the verdict as unsupported by the proofs. The court, therefore, properly refused to instruct as requested by the defendant.

The facts were submitted for the determination of the jury solely upon the following instructions:

“First—The defendant company undertook to carry the plaintiff from Grand Island to Kearney. If the plaintiff was injured during the journey the defendant company is

liable for the actual damages which he sustained, unless the injury done arose from the negligence of the plaintiff.

"Second—It was the duty of the company to notify the plaintiff that he was approaching his destination. It is claimed by the plaintiff that the train stopped before it reached the platform at the depot. This is denied by the defendant. The court charges the jury that it was the duty of the company to cause its train to be pulled up to the depot platform, so that the passengers might alight upon said platform with convenience and safety; but it was not incumbent upon the company to build a platform as long as its train, nor to pull up each car so that it was abreast of the platform. If the railway company furnished to the plaintiff at Kearney such facilities as it had for leaving the train, and the length of the platform available for that purpose was used by the company in unloading its passengers, and the same was reasonably adequate for that purpose, it ought not in that particular be required to do more.

"Third—If the plaintiff, without fully realizing what he did and without time or opportunity to consider the natural consequences of his act, suddenly jumped from the train, and he was caused to do so by haste and a confusion of ideas as to what was right and proper under the circumstances, and such haste and confusion were the direct results of the conduct of the defendant's agent in not sufficiently notifying the plaintiff as to his whereabouts when the train stopped, you will inquire and determine whether the company was negligent, and whether the injury resulted from the company's negligence; and if you further find that the plaintiff in jumping from the train exercised the care, prudence, and intelligence of an ordinary person placed in like circumstances, and was excusable for leaving the train in the manner shown, you will find for the plaintiff. At the same time, if it was not the fault of the company that the plaintiff was mistaken as to the location of the train, if he was mistaken, or if the plaintiff, exercising

ordinary care and prudence, could not have been so mistaken, if he was mistaken, or if plaintiff's haste and confusion, if any, were not due to the misconduct of defendant's agent in running the train, then plaintiff cannot recover.

"Fourth—If you find for the plaintiff, you will be careful to allow him only the actual damage which he has sustained, and no more; and you will remember that the burden of proof is upon the plaintiff, and unless he establishes his case by a preponderance of evidence, you will find for the defendant."

The greater part of the argument of plaintiff in error is devoted to the first instruction, which was, in effect, that as the defendant company had undertaken to carry plaintiff from Grand Island to Kearney, if plaintiff was injured during the journey the defendant company was liable for the actual damages which he sustained, unless the injury done arose from the negligence of the plaintiff. Plaintiff in error insists that this requires the railroad company in all cases to become an insurer of the safety of its passengers. Perhaps there is some hidden meaning in this term, and that by conceding the position claimed, we might admit more than we would be willing to, if the same proposition was stated in other language. We desire that there shall be no uncertainty as to our views. Section 3, art. 1, ch. 72, Comp. Stats., is in the following language: "Every railroad company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said railroad, actually brought to his or her notice."

In the case of the *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, the following instruction was approved by this court: "The term 'criminal negligence,' as it is used in

the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of our own safety, and amount to a willful indifference to the injury liable to follow." Counsel for plaintiff in error insist that this provision is unconstitutional and violative of the rights of railroad companies in actions such as the one at bar. It is not believed that this statute is unconstitutional; and, as to its being unjust in its operation, the remedy lies with the legislature. We find it existing as a statute, and know of no reason why by judicial legislation or consideration it should be abrogated or modified. The rule laid down by the court in the first instruction was correct, as far as it went, for the statute makes liable a railroad company for any injury sustained by a passenger being transported over its line of road, which injury results from the operation or management of the train, unless the railroad company can show that the injury complained of was one which resulted from a violation of some express rule or regulation of the railroad company, actually brought home to the notice of the passenger; or, that the passenger was guilty of such negligence as would amount to a flagrant and reckless disregard of his own safety, and a willful indifference to the injury liable to follow his conduct. (*Missouri P. R. Co. v. Baier*, 37 Neb., 235.)

In the second instruction quoted we cannot find that the plaintiff in error had any ground of complaint. If the verdict had been for the railroad company it might admit of grave doubt whether, as stated in the last sentence of the second instruction, the railroad company had done enough to exonerate itself from liability in that respect by showing it had furnished for the plaintiff all the facilities it had for leaving the train, and a platform reasonably adequate for the purpose of unloading passengers at said depot. A question might arise as to whether or not its facilities were all it should have had for unloading passen-

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State, ex rel. Clark, v. School District.

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gers. The fact that it did not have them might be such negligence as would render the company liable for an injury caused by a failure of the company to provide proper facilities.

The third instruction was confusing in its statements as to facts as to which it was assumed there was evidence. This confusion, however, was in its tendency rather hostile than otherwise to plaintiff's right of recovery.

The judgment of the district court is

**AFFIRMED.**

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STATE OF NEBRASKA, EX REL. WILLIAM M. CLARK  
& COMPANY, v. SCHOOL DISTRICT No. 24, CHASE  
COUNTY, NEBRASKA, ET AL.

FILED NOVEMBER 8, 1893. No. 5481.

**Mandamus : FORUM OF JURISDICTION.** This proceeding being simply one for the collection of a debt, of which the district court of Chase county has ample jurisdiction, a writ of *mandamus* is denied, and the action dismissed. *State, ex rel. Herpolsheimer, v. Lincoln Gas Co.*, 38 Neb., 33, followed.

ORIGINAL application for *mandamus*.

*Samuel J. Tuttle*, for relator.

RYAN, C.

This is an original application for a *mandamus* brought against school district No. 24 of Chase county, Nebraska, and its treasurer, H. H. Waggener. The petition alleges the existence of an indebtedness on various accounts on the part of said school district, and that the several evidences of indebtedness have been duly assigned to the relator, and that the school district refuses to pay the same. The

38	237
38	511
38	237
61	857

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First Nat. Bank of Mount Pleasant v. Davis.

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prayer is that a writ of *mandamus* issue commanding the treasurer to pay the said orders, and that if it be shown by the answer and return of said treasurer and by proof that there are no funds in his hands for the payment of the same, said school district be compelled by *mandamus* to levy and collect a sufficient amount of taxes to pay said orders.

This petition was filed June 30, 1892; and it is probable that the present status of affairs in that school district would require in this petition an amendment for the purpose of submitting the case properly. There has been no brief served or filed, so far as the record shows, and no answer made. In view of these facts, and the further fact that this *mandamus* proceeding is brought simply for the collection of a debt due from the school district to private individuals, we are compelled to follow the rule laid down in *State, ex rel. Herpolsheimer, v. Lincoln Gas Co.*, 38 Neb., 33. The application is therefore dismissed without prejudice.

DISMISSED.

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38 238  
54 416

FIRST NATIONAL BANK OF MOUNT PLEASANT, IOWA,  
APPELLANT, v. WILLIAM DAVIS, APPELLANT, IM-  
PLEADED WITH ROBERT W. BUCHANAN ET AL.,  
APPELLEES.

FILED NOVEMBER 8, 1893. No. 5058.

**Chattel Mortgages: LIENS: IDENTITY OF PROPERTY.** The question in this case being merely whether or not two certain chattel mortgages covered property sold, and the evidence being insufficient to establish the identity claimed, the mortgagee's claim of a lien upon the property is denied.

APPEAL from the district court of Douglas county.  
Tried below before DAVIS, J.

*Saunders & Macfarland*, for appellant First National Bank.

*A. C. Wakeley*, for appellant William Davis.

*Holmes & Macomber*, for appellees.

RYAN, C.

The First National Bank of Mount Pleasant, Iowa, based its right to recovery in the district court of Douglas county, Nebraska, upon the alleged fact that as mortgagee it held a lien upon certain cattle sold by Robert W. Buchanan to divers and sundry persons through the commission firm of Byers, Patterson & Company at South Omaha, Nebraska. One mortgage was made by William Davis on January 18, 1888, to plaintiff's cashier, to secure payment by Davis of his note for \$1,000 of even date with said mortgage, due in six months, and was filed for record December 21, 1888; an agreement for an extension of the time of payment of said note of six months having, meantime, been entered into between the maker and payee. Another mortgage between same parties as the first was of date August 9, 1888, to secure payment of a promissory note made by the mortgagor to the mortgagee, for the sum of \$500, with ten per centum per annum interest, due in six months from its date, August 9, 1888. This mortgage was also filed for record December 21, 1888. The plaintiff alleged in its petition that Robert W. Buchanan, on or about December 19, 1888, being employed as a servant and agent of said mortgagor, obtained possession, or at least temporary control, of the mortgaged property, and having wrongfully transported the same to South Omaha, Nebraska, did sell that part of the same in respect of which relief was prayed in this action, and that as proceeds of such sale of the property last above referred to, Byers, Patterson & Company, the firm of commission merchants

through whom this sale was made, had received and were in possession of the sum of \$742.38, which plaintiff claimed should be applied to the notes secured by the above mortgages. From the averments of the petition it appears that on December 21, 1888, the very day upon which the mortgages were filed in the proper office in Henry county, Iowa, plaintiff commenced an action in the district court of Douglas county, Nebraska, against Robert W. Buchanan and William Davis, to recover the value of the property mortgaged, and in that action procured the garnishment of Byers, Patterson & Company, with the hope of reaching the money held by them. This firm of commission merchants, to relieve themselves of liability, paid said money into the hands of the clerk of said district court. Subsequently the attachment was dissolved, and this action was commenced to restrain the clerk aforesaid from paying said money to said Buchanan, and for the enforcement of the mortgagee's lien as against the proceeds of the sale of the mortgaged property in the hands of said clerk.

The answer of William Davis admitted the facts to be as set forth in plaintiff's petition, and its prayer was that plaintiff should be decreed the relief prayed in its said petition. The answers of the other defendants, except that of Buchanan, simply pleaded the interest in the subject-matter of the controversy above indicated as being held by each of said defendants. Robert W. Buchanan answered, admitting the indebtedness of William Davis to plaintiff, but denying every other averment of plaintiff's petition. Buchanan further alleged that he was, previous to the sale, in the lawful possession of, and had the right to sell, the property which he did sell at South Omaha; that about March 17, 1884, he, the said Buchanan, entered into partnership with William Davis, his father-in-law, and that by the terms of the partnership agreement said Davis was to furnish stock to be placed upon the farm of William Davis' wife in Henry county, Iowa, and that said Bu-

chanan was to move upon and cultivate said farm, and raise and fatten stock thereon; that said Buchanan and Davis were equal copartners and owners of all the stock and crops raised on said farm; and that he was in the active charge and management of the business incident to the operation of said farm, and raising and fattening stock thereon, and had the power and authority to sell the same. Defendant Buchanan further alleged that the firm of which he was a member was never indebted to plaintiff, and that if William Davis executed a mortgage as claimed, it was to secure his own private debt and not that of the partnership, and that said defendant never consented to the making of said mortgages. This defendant averred that on December 20, 1888, he sold the property aforesaid as of right he had authority to do; that he was not insolvent; and admitted that Byers, Patterson & Company had paid into the hands of the district clerk aforesaid the proceeds of the sale of the aforesaid property, but denied that plaintiff had any claim or right thereto, and pleaded the order dissolving the attachment as an adjudication of the matters in controversy.

There was a reply in denial of the averments of the answer of Robert W. Buchanan. As between the defendants themselves there were other pleadings, the nature of which is not of importance in this controversy, as the issues are mere collateral incidents thereto. On the final hearing a judgment was rendered against the plaintiff, and therein it was ordered that the money in the hands of the clerk should be paid to Robert W. Buchanan, in whose favor the equities were, by the decree, found to exist.

The evidence was mainly directed to two questions of fact: First, the identity of the property sold in South Omaha with that mortgaged; second, the authority of Robert W. Buchanan to make the said sale. The cattle sold were thirteen two-year-old steers, three long yearlings, nine two-year-old heifers, and one cow. The mortgage

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First Nat. Bank of Mount Pleasant v. Davis.

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first made was of date January 18, 1888, and the cattle thereby mortgaged were described as fifteen head of two-year-old steers and five head of two-year-old heifers, while in the second mortgage made on August 9, 1888, the cattle were described as fourteen two-year-old steers and eight three-year-old steers. The sale at South Omaha was about, probably on, December 20, 1888. It is quite probable that cattle which were two years old in January of 1888 would ordinarily in the following December be classified as three-year-olds instead of two-year-olds. The testimony outside the mortgage itself does not help us to any conclusion whatever upon this point. In the mortgage of date August 9, 1888, there were cattle described as eight three-year-old steers. These of course could by no means be made to answer in December following to two-year-old steers. There were described in the last named mortgage fourteen two-year-old steers; but as to these which might meet the description of part of the cattle sold in South Omaha there arise other considerations just as troublesome to deal with as those just discussed.

The evidence of William Davis is that he sold Geesecke twenty two-year-old steers, but he said that he did not suppose he sold all the two-year-olds included in the mortgage to secure payment of the \$500 note, because he did not sell enough cattle to cover those mortgaged, which amounted in value to over a thousand dollars. Robert W. Buchanan testified that these cattle were sold August 28, 1888; that they were brought to the farm something like twenty or twenty-one days before the date last named. As it was, according to his own evidence, the general custom for Mr. Davis to mortgage stock as soon as he bought it to secure the bank for the money used in making the purchase, it seems reasonable, in the conspicuous absence of proof to the contrary, that the mortgage of August 9 was executed to secure such part of the purchase price of these cattle as Mr. Davis borrowed of the bank for that purpose. At

any rate, this mortgage as clearly covered part of those sold Geesecke as any other cattle. If, as contended on behalf of the bank, there were upon the farm August 9, the fourteen two-year-old steers covered by the mortgage made in January, and the twenty two-year-old steers afterward sold Geesecke, another difficulty would be presented, and that is, that the mortgage in no way segregated from the herd any particular cattle. The same difficulty, less only in degree, is presented when it is taken into consideration that this mortgage was of fourteen two-year-old steers, when in fact there were twenty, any fourteen of which, if distinguished properly, would have met this description. The burden of designating the particular cattle mortgaged, was upon the mortgagee; and as the bank failed in this, it was not entitled to the proceeds of the sale made by Robert W. Buchanan, especially as there was evidence fully justifying the court in finding that he was joint owner of all the cattle raised on the farm occupied by him and his wife subsequently to March 17, 1884.

On this last proposition the evidence is conflicting as to the arrangement under which the farm was to be operated. Mr. Buchanan testified that on the date last named it was agreed between Mr. Davis and himself that he was to have one-half the crops and stock raised on the farm subsequently to the above date, in which he is corroborated by the testimony of his wife. There is ample evidence of just such a continuous course of dealings as such an agreement would sanction from March 17, 1884, up to the time when the cattle were sold in South Omaha. This is not, therefore, a case in which a mere stranger had taken away and sold cattle, but it is one in which the party by whom the sale was made was but exercising a contract right so to do. The findings of the district court were fully justified by the evidence, and its judgment is therefore

AFFIRMED.

38	244
48	811

38	244
62	186

GEORGE H. HAMMOND COMPANY V. WILLIAM J.  
JOHNSON.

FILED NOVEMBER 8, 1893. No. 4650.

1. **Master and Servant: APPLIANCES: NEGLIGENCE OF MASTER: LIABILITY FOR INJURY TO SERVANT.** It is the duty of a master to furnish for the use of his servant in the course of his employment, proper and safe appliances and instruments for the performance of the services required. And if the master fail so to do, he is liable for such damages as are the direct result of such negligence, unless the servant himself is guilty of such negligence as contributes directly to the injury; and this rule applies irrespective of whether the appliances and instruments so furnished were animate or inanimate.
2. ———: **FURNISHING SERVANT WITH VICIOUS HORSE: KNOWLEDGE: PERSONAL INJURIES: INSTRUCTIONS.** Where a master, a corporation, furnished a horse for the use of its servant in the line of his employment, wherein said horse injured the servant, the jury were properly instructed that even if they should find the horse was vicious and dangerous, still that the plaintiff could not recover unless the jury further found from the testimony that the master, through its managers or officers, knew, or by the exercise of proper care and diligence *might have known*, of the vicious and dangerous character of the horse.
3. ———: **VICE-PRINCIPAL: EVIDENCE: INSTRUCTIONS.** The evidence in this case justified the jury in finding that the agent who, in the employ of a common master with the servant, directed the said servant to use the horse, whereby said servant was injured, was not his mere co-servant, but in giving the instruction aforesaid was a vice-principal, and the master was, therefore, properly held liable for the injuries received by the servant in obeying such instruction.

ERROR from the district court of Douglas county.  
Tried below before DOANE, J.

*Robert W. Patrick*, for plaintiff in error.

*A. S. Churchill*, contra.

RYAN, C.

This action was brought in the district court of Douglas county, Nebraska, by William J. Johnson against The George H. Hammond Company, a corporation, for compensation in damages in respect to injuries inflicted upon said plaintiff by a vicious, unbroken horse, of which plaintiff alleges that defendant, in whose employ he was, required plaintiff to take charge and drive in the course of his said employment. The petition, after alleging that the horse was vicious and unruly, sets forth that the defendant's manager, who well knew the vicious disposition of said horse, without giving plaintiff any notice of the existence of such disposition, required plaintiff to use the said horse in the course of his employment, and that plaintiff did use him as required, when the aforesaid horse, without any fault on plaintiff's part, began to kick and run, and became unmanageable and thereby inflicted the injury complained of, from which it resulted that plaintiff was for a long time confined to his bed, and suffered intense and long continued pain, and that at the commencement of this suit plaintiff was still suffering from his said injuries. There was also alleged the loss of a month's time, the expenditure of large sums of money for medical and surgical treatment rendered necessary by said injuries, which, with such other incidental results as followed from the injuries complained of, amounted to \$10,550, for which plaintiff prayed that he might have judgment.

The answer admitted that plaintiff, while in defendant's employ, was furnished the horse of which complaint is made in plaintiff's petition, and alleged that said horse was not in any way vicious or unbroken, but that the plaintiff was not a skillful or careful driver of horses as alleged in his petition, and that it was owing to such lack of skill and want of care on his part that the alleged runaway of the horse and consequent injury to plaintiff was wholly due. There was in this answer the averment that defend-

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Hammond v. Johnson.

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ant had paid all expenses arising from the accident during the time that plaintiff was thereby incapacitated for work, and that the defendant had paid the surgeon's bill rendered necessary by the injury complained of, as well as for all loss of time which resulted from the injury to the plaintiff. Furthermore, the defendant answered that the injuries received by plaintiff were rendered serious by the misconduct of the plaintiff himself, in that, contrary to the advice of his attending surgeon, the said plaintiff persistently indulged in the use of intoxicating liquors.

There was a reply in denial of these matters affirmatively set up by way of defense to the petition of the plaintiff. Of the issues joined there was had a jury trial, which resulted in a verdict in favor of the plaintiff for \$4,750. Upon hearing the motion for a new trial the plaintiff was required to enter a remittitur. (as the condition upon which said motion would be overruled) of the excess of the verdict over \$3,500; which remittitur was accordingly entered, and judgment thereupon rendered for the sum last named. To reverse this judgment the defendant files its petition in error in this court.

The evidence in this case showed without question that the horse of which complaint is made was a young, awkward, green horse, as some of the witnesses expressed it. That he was a large, powerful animal, there seems to have been no dispute, and it seems quite clear from the evidence that he was not naturally of a very vicious disposition, as that term is generally understood. He was not, however, a well broken animal when he was purchased by defendant in error's agent a short time before the accident, and his shortcomings in that direction seem to have been aggravated, rather than overcome, by the unskillful management of him by some of the employes of plaintiff in error, to whose care he was entrusted to be broken and handled. This was the condition of matters when this horse was intrusted to the defendant in error to be used upon the streets

of the city of Omaha, as part of a team which handled and delivered to the regular customers of plaintiff in error, butcher's meat, the preparing of which for market in that condition was in plaintiff in error's line of business. The agents of plaintiff in error were aware of the above described untrustworthy character of the horse in question at the time the defendant in error was required to drive him, yet in no way imparted that information to the defendant in error. The evidence shows that the defendant in error was a careful and skillful driver of horses, and, notwithstanding the averments of the answer, no witness questioned his qualification in that respect. There was no trouble with the horse the first day he was driven by the defendant in error. On the day following, the horse by kicking got one hind foot over the tongue of the wagon, but without further accident was gotten to rights. This was on Saturday, and the horse was not again hitched up until the following Monday, April 7, 1890. He then became unmanageable, and again kicking while attempting to run away, struck the plaintiff on the left leg below the knee, thereby inflicting the injury complained of in this suit. At first there was rapid progress in the healing of the injuries. Subsequently, however, erysipelas developed, causing great suffering and long confinement, as well as greatly augmenting the amount necessary to defray incidental expenses and surgeon's bills. The payments pleaded in the answer seem to have been made up almost to the time of this complication, when they ceased, for the apparent reason that the plaintiff in error regarded this last phase of defendant in error's trouble as not at all attributable to the accident suffered by him.

It is proper to remark in this connection that the jury were fully justified in finding from the evidence that no misconduct of the defendant in error in the forbidden use of intoxicating liquors caused the erysipelas which supervened as above described. The instructions refused and

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Hammond v. Johnson.

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given very fully considered all aspects of the case, but they are too voluminous for insertion herein at length. Complaint is specially made as to the first and fourth instructions given by the court upon its own motion. They were as follows:

"1. You are instructed that it was the duty of the defendant to furnish for the use of the plaintiff in its service proper and safe appliances and instruments for the performance of the services for which he was employed, and if it failed to do so, it would be liable for such damages as were the direct result of such negligence, unless the plaintiff was himself guilty of negligence which contributed directly to his injury."

"4. Even if you should find that the horse was a vicious and dangerous horse, still the plaintiff could not recover unless you should further find from the testimony that the defendant, through its managers or officers, knew, or by the exercise of proper care and diligence might have known, of the dangerous and vicious character of the horse."

The criticism of the first instruction is because it applies to animals the same rule as is ordinarily applied to inanimate machinery or tools in requiring that such as are furnished for use shall be safe and proper for the purpose for which they are furnished. It is probably true, as claimed by plaintiff in error, that the cases in which the duty of the master towards the servant in this regard have been adjudicated have been where the articles furnished were tools or machinery. No case has been cited holding the distinction claimed, nor can we conceive of any reason why it should exist. In the nature of things it is but right that the master, who may exact obedience to his orders, shall give his servant such information within his knowledge as will enable such servant to guard against injury to himself. If the servant is possessed of such knowledge he is bound at his peril to act accordingly, and it would seem that the

withholding by the master of such information as is necessary to enable the servant to provide for his own safety is correlatively at the peril of the master. It is immunity from injury that must be looked to, and it matters not from what source danger may impend, whether arising from the imperfections of machinery or the vicious and unsubdued propensities of animal nature, it is equally the duty of the master to forewarn, and thereby forearm, his servant against it.

The criticism of the fourth instruction is, that the plaintiff in error was thereby held liable, not only for the knowledge of facts which its officers and managers possessed, but as well for such knowledge of facts as by the exercise of due and proper care they might have known. The contention is, that this corporation should be held only for the actual knowledge of its officers and managers, their failure to possess knowledge not being imputable to the corporation. A corporation, however, can do nothing and be guilty of nothing except by its officers and agents. If the negligence of its officers and managers is not imputable to the corporation, it can be guilty of no negligence whatever. A corporation because of its being but an artificial entity, cannot with impunity neglect the performance of such duties towards its servants as their safety requires. It can see but with the eyes of its officers and agents, and if they refuse or neglect to use their eyesight when occasion demands, this furnishes no reason for a judicial adjudication that the corporation itself is blind. Its liability in this respect is such as would devolve upon a natural person under like circumstances, as to which the rule is laid down in section 349 of Wood's Law of Master and Servant. The following language is quoted from that section: "Where there are latent defects or hazards incident to an occupation, of which the master knows, or *ought* to know, it is his duty to warn the servant of them fully, and failing to do so, he is liable to him for any injury that he may sustain in consequence

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Hammond v. Johnson.

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of such a neglect; and this rule applies even where the danger or hazard is patent if through youth or inexperience or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard. It is the master's duty to warn him of any danger incident to the business, and if with such knowledge, he chooses to assume the risk and is capable of appreciating the hazards and of choosing and contracting for himself, the master is then absolved from liability for injuries resulting from the ordinary hazards."

There was an attempt to apply in argument the rule deducible from certain cases wherein the liability was sought to be fixed by reason of injuries suffered by strangers from the bites of dogs and kicks of horses. Such cases, however, are not governed by the same rule or reason as the case at bar, for the owner in such cases was not instrumental in placing the injured party in danger, and was therefore held liable only for such knowledge of the evil propensity of the animal complained of as he actually possessed. In the class of cases under consideration, however, the servant is not a mere volunteer. He is required by his master to assume the danger which the existence of vicious and uncurbed propensities implies, and if the master could, by the exercise of reasonable care, know of the existence of such propensities, his actual ignorance of them is no excuse in law.

It is contended that the verdict was excessive in view of the injuries shown by the evidence. As an original question viewed solely in the light of the written record, we might arrive at the same conclusion as contended for by counsel for plaintiff in error. The presiding judge, however, who heard the witnesses, saw and observed their deportment, and was consequently possessed of fuller means of knowledge than can possibly be accorded us, has considered this question, and in the exercise of his enlightened judgment required a considerable reduction of the estimate

of damages made by the jury's verdict. We cannot say he should have required more.

Counsel for plaintiff in error insists that as the knowledge of the vicious and unbroken disposition of the horse was possessed solely by others in the employ of the plaintiff in error, that the defendant in error must be held to the rule which forbids a recovery by one servant based upon the negligence of his co-servant. The evidence, however, is very satisfactory that the person who directed the defendant in error to take charge of and drive the horse which caused his injury was not a mere co-servant of the defendant in error. When he directed the defendant in error to take charge of and drive this horse the evidence shows that the defendant in error hesitated, and rather sought to excuse himself from doing as required. Thereupon he was informed by the person who made this requirement of him that he might either do that or quit the job, and under this kind of suasion he did as directed. The language was the language of one in authority, and the evidence fully satisfies us that he was not a mere co-servant of the defendant in error, but was rather a vice-principal, and that therefore the rule contended for is not applicable.

There was presented in the record, though not argued, the fact that a continuance was applied for by the plaintiff in error on account of the alleged absence of a material witness. The affidavit in support of this application was made by the attorney for the plaintiff in error, and therein was stated the fact that the absence of the witness came to affiant's knowledge only the day before the affidavit was made. This probably accounts for the circumstance that in said affidavit the ultimate facts to be proved by the testimony of the witness were not stated, but that such matters as were stated were conclusions properly deducible from facts, rather than the facts themselves. In this respect the affidavit was faulty, and hence there was no error in refusing the continuance asked.

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McConnell v. First Nat. Bank of Lincoln.

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This disposes of all the questions presented, and it results that the judgment of the district court is

AFFIRMED.

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JOHN L. McCONNELL, APPELLANT, v. FIRST NATIONAL  
BANK OF LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 8, 1893. No. 5074.

1. **Accounting: PLEADING: COSTS: EQUITY.** Where the answer admits there is due the plaintiff a certain sum, much smaller than claimed in the petition, and all the averments of new matter in the answer are unequivocally denied by the reply, judgment must be for the amount admitted to be due. The allowance of costs being discretionary, none are taxed as incident to the above judgment, because of the confused condition of said issues as presented in the district court.
2. **Special Findings: CONFLICTING EVIDENCE: REVIEW.** Upon the request of the plaintiff therefor, a special finding as to a very material disputed fact was made by the trial court in favor of the defendant. *Held*, In the absence of a clear preponderance of the evidence to the contrary, that such finding conclusively establishes the existence of the fact as found.
3. **Accounting.** A sheriff in possession of a stock of goods, pending their sale for the satisfaction of certain attachments in his hands, having sold a part of said goods, and collected claims due the attachment defendant, paid the proceeds of such sales and collections to the purchaser of the stock, who bought irrespective of such sales and collections. *Held*, In a suit for an accounting between the attachment defendant, who has paid all claims against him, and the recipient of such proceeds and collections, that said attachment defendant is entitled to recover the amount of such proceeds with interest from the time they were received by said purchaser.

APPEAL from the district court of Lancaster county.  
Heard below before HALL, J.

*J. R. Webster, E. P. Holmes, and Webster, Rose & Fisherdick, for appellant.*

*Marquett, Deweese & Hall and Pound & Burr, contra.*

RYAN, C.

The plaintiff sued the defendants John R. Clark, the First National Bank of Lincoln, Nebraska, and Louie Meyer, in the district court of Lancaster county, claiming that the said Meyer agreed to purchase, for the benefit of the plaintiff, a certain stock of goods, and that the defendant John R. Clark, who was cashier of the First National Bank aforesaid, on behalf of the said bank, agreed to furnish the means for the purchase of said stock, and that the said purchase should be for the benefit of the plaintiff; and that after the purchase aforesaid had been made there was a large profit made upon the sale of the said stock of goods, which, after the payment of all incidental expenses, belonged to the plaintiff. The plaintiff prayed an accounting as to the profits and incidental expenses aforesaid, and that the plaintiff have judgment for such amount as should be found due him upon such accounting. The specific allegations of the pleadings will be noticed more particularly hereafter, as such notice becomes necessary in the consideration of the facts.

1. The above is a very general statement of the relief prayed, and of the facts upon which such relief was claimed. In the commencement of his petition, however, the plaintiff alleged that on the 20th day of December, 1884, he was engaged in the retail dry goods business, and that at that time the plaintiff, in order to secure the sum of \$20,000, previously advanced by the said bank, made and executed a chattel mortgage upon his entire stock of merchandise and delivered the possession of said merchandise to the defendant John R. Clark, as cashier, for the First National Bank; that after the execution of said mortgage,

certain creditors of plaintiff sued out writs of attachment against him, and caused the same to be levied upon the merchandise, subject to the aforesaid mortgage.

The petition further alleged "That afterwards said defendants John R. Clark and the First National Bank of Lincoln, Nebraska, having sold a large amount of said merchandise under and by virtue of said mortgage foreclosure, and having realized a much larger amount than was sufficient to satisfy said mortgage, together with all costs and expenses of foreclosure, delivered the remaining part of the said merchandise to the sheriff of Lancaster county, Nebraska, who duly offered said merchandise for sale to satisfy the claims and demands of said attaching creditors on the 11th day of April, 1885." As to the failure of Clark and the First National Bank to render an account with reference to the foreclosure aforesaid, the petition alleged that they had wholly failed and refused to render such an accounting, although the said defendants had sold a large amount of said stock in excess of the amount of plaintiff's indebtedness under said mortgage. The prayer of the petition was broad enough to justify the plaintiff's recovery of whatever relief the facts showed him entitled to in respect to the said foreclosure and failure to account.

In the answer of John R. Clark and the First National Bank there was the following allegation: "Defendants admit that said bank has in its hands the sum of \$199.87, which was realized from the sale of said goods under said mortgage, more than was necessary to pay said mortgage with interest thereon and the costs and expenses in connection with the foreclosure of the same; that an account of this amount was rendered by said bank to the said John L. McConnell at the time of the cancellation of his indebtedness to this bank under and by virtue of said chattel mortgage, and that said money has been in said bank with the knowledge of the said plaintiff and subject to his order

since about the first day of March, 1885, but that the said McConnell has failed, refused, and neglected to receive the said money from this defendant; that an account was rendered to said McConnell showing the amount of goods sold under said mortgage, also the amount in excess of said mortgage, and the amount of expenses and costs in connection with the foreclosure of said mortgage, which said account showed a balance in the hands of said bank of \$199.87, subject to the order of said John L. McConnell."

This answer was followed by the reply of the plaintiff in the following words: "Comes now the said plaintiff and for reply to the answer of the said defendants filed herein denies each and every allegation of new matter therein contained." It will be observed that this averment of the defendants, that there was due from the bank, on account of the foreclosure, a balance of \$199.87, was denied by McConnell in his reply. This anomalous condition of the pleadings probably accounts for the action of the district court in denying relief as to the amount admitted to be due from the bank.

It is claimed, however, in argument, that the proofs show that there was not only this amount, but even a very much larger sum due on this account from the bank to McConnell. Apparently, as merely incidental to the inquiry, which we shall hereafter note, McConnell testified that the sales under the chattel mortgage amounted to \$23,866.26. The debt secured was \$19,500. The sales, which were private, extended over the interim between December 20, 1884, and March 24, 1885, and the interest which accrued between these dates, at the rate of ten per cent per annum, was \$509.17. This would leave a balance due McConnell of \$3,857.09, the incidental expenses not being considered. There was evidence, however, that out of this there was paid, with the assent of McConnell, to Harwood, Ames & Kelly, McConnell's attorneys, the sum of \$500. There was paid to Mr. Pratt, for superintending the foreclosure,

the sum of \$300. The evidence as to the incidental expenses necessary to the foreclosure, carried on by private sales for the period of three months, is not at all direct. On the part of McConnell it was testified by him that, after April 11, succeeding the said foreclosure, the expense of running the store was not to exceed \$600 a month. Opposed to this, and given as on the same hypothesis, was the evidence of Louie Meyer that these expenses amounted to from \$800 to \$1,000 per month. Assuming the highest basis of computation as correct, there would not be due from the bank to McConnell even \$199.87, the amount which is admitted by the answer. Reckoned upon the basis afforded by McConnell's testimony, there would be due from the bank to McConnell a balance of \$1,577.10. This evidence was given apparently with reference entirely to transactions had after April 11, 1885, and therefore affords very unsatisfactory data for the consideration of transactions which occurred between December 20, 1884, and March 24, 1885. The district court, however, by its general finding, must have concluded that there were no sufficient proofs on which to base a decree in favor of McConnell for any overplus arising from sales on the foreclosure of the mortgage. It would seem, however, that to the extent of \$199.87, conceded by the bank in its answer to be due, there should have been a finding in favor of McConnell for that amount. In view of the anomalous condition of the pleadings, however, (that is, the answer admitting this amount to be due and the reply denying it), we are of the opinion that no costs should be taxed in favor of the plaintiff on account of his right to recover from the bank the aforesaid sum of \$199.87, conceded by the bank to be due him. The decree of the district court, in this respect, is therefore modified to the extent of allowing the plaintiff, as against the aforesaid bank, a judgment for \$199.87, without interest or costs.

2. The next matter which demands our consideration

seems to have been that with reference to which this action was principally brought. In respect to this branch of the case the averments of the petition were that, after the foreclosure to which reference has been made, John R. Clark and the First National Bank of Lincoln delivered the remaining part of the merchandise of the plaintiff to the sheriff of Lancaster county, Nebraska, who duly offered said merchandise for sale, to satisfy the claims and demands of attaching creditors, on the 11th day of April, 1885. It is possible that an attempt to epitomize the statements of the petition in this regard may do injustice either by the omission of some important matter, or in some other respect, wherefore it is that the allegations will be quoted in *hæc verba*. The following averments occur in the petition:

“Fourth—Plaintiff further represents to the court that in order that said stock of goods might sell for the greatest possible amount, and its full value obtained at said sheriff’s sale, this plaintiff was desirous of competition with bidders present at said sale, and in order to accomplish the same and purchase said stock without sacrifice to this plaintiff or to his creditors, plaintiff consulted and advised with defendant John R. Clark and procured his consent and agreement to advance this plaintiff from said defendant bank such sum of money as might be necessary to enable plaintiff to purchase said stock at said sheriff’s sale. And it was further agreed that all of said business and the purchase of said stock should be in the name of the defendant Clark or the said First National Bank.

“Fifth—That afterwards said Clark, professing friendship for said plaintiff, and advising in this plaintiff’s behalf, advised the purchase of said stock in the name of another person other than this plaintiff or the said First National Bank, representing that it would be a more business-like transaction and more consistent with its, the said bank’s, method of doing business, this plaintiff’s credit

having been previously impaired by reason of said attachments aforesaid. That, acting under the instructions of the said defendant Clark, and confiding in his sincerity, honest purpose, and intention, it was agreed by this plaintiff and defendant Clark that he should procure some person to act on behalf of this plaintiff as in manner aforesaid, and in plaintiff's place, who should, for plaintiff's benefit and use, purchase said stock, defendant Clark agreeing to advance the necessary amount of money as aforesaid; that afterward defendant Clark informed this plaintiff that he had procured the consent of said defendant Meyer to act for this plaintiff, and who should purchase said stock and hold the same under the instructions of this plaintiff and in trust for him. And it was further agreed and understood that in consideration of such services as were agreed to be rendered this plaintiff by the said Meyer, he should receive from plaintiff the sum of \$500.

"Sixth—That acting under and by virtue of said arrangement, agreement, and understanding, and relying upon the promises of the said defendants, and upon the terms aforesaid, on the 11th day of April, 1885, at said sheriff's sale, this plaintiff advised and instructed the defendant Meyer to bid at said sale, and said stock was purchased in trust for this plaintiff by the said defendants through and by the said defendant Meyer for the sum of \$20,200; that said Meyer, acting for plaintiff and the other defendant, and under plaintiff's instructions and advice, opened said stock of goods so purchased to the general trade and continued the sale of said stock at retail until on or about the month of April, 1886; that during said time said Meyer, upon the advice and instructions of this plaintiff, paid to the defendants Clark and the First National Bank the sum of \$20,200, with interest thereon at the rate of ten per cent per annum, previously advanced by the said Clark and the First National Bank in accordance with the agreement and understanding aforesaid; and also paid all costs and ex-

penses of carrying on said business; that in the month of April, 1886, said Meyer, for this plaintiff and under his advice and instructions, sold the entire remaining amount of said stock to one Joseph Shoenberg for the sum of \$10,000 in cash, and paid said amount so received to the defendant Clark and the First National Bank."

"Seventh— \* \* \* That said defendants John R. Clark, the First National bank, and Louie Meyer, in violation of all agreements with this plaintiff as aforesaid, ever since said sheriff's sale on April 11, 1885, up to the present time, and in breach of the trust on their part assumed on behalf of this plaintiff, have conspired together to cheat and defraud this plaintiff, and plaintiff alleges the fact to be that said defendants Clark and the First National Bank agreed with plaintiff to purchase said stock and advance the money as aforesaid, and so instructed and advised plaintiff as above set forth, and so procured the said defendant Meyer to purchase said stock in pursuance with the conspiracy previously planned by and between the said defendants to cheat, defraud, and deprive plaintiff of his rights in the premises, and in pursuance with such conspiracy to defraud and cheat plaintiff have failed and refused to render an accounting of the proceeds of said sale as above set forth, and have refused to pay over to this plaintiff the large amount of money in their hands arising from said sale, belonging to this plaintiff by reason of said agreement and trust aforesaid; that during all the times herein mentioned this plaintiff was unable to ascertain from the books of account the true account of the items of receipts and expenditures, as the same were kept by the defendant Meyer, and plaintiff was refused access thereto, so that plaintiff has no knowledge of the true amount owing by said defendants to this plaintiff.

"Eighth—Your petitioner further represents that although he from time to time applied to the said defendants, and requested them to come to a full and fair accounting

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having been previously impaired by reason of said attachments aforesaid. That, acting under the instructions of the said defendant Clark, and confiding in his sincerity, honest purpose, and intention, it was agreed by this plaintiff and defendant Clark that he should procure some person to act on behalf of this plaintiff as in manner aforesaid, and in plaintiff's place, who should, for plaintiff's benefit and use, purchase said stock, defendant Clark agreeing to advance the necessary amount of money as aforesaid; that afterward defendant Clark informed this plaintiff that he had procured the consent of said defendant Meyer to act for this plaintiff, and who should purchase said stock and hold the same under the instructions of this plaintiff and in trust for him. And it was further agreed and understood that in consideration of such services as were agreed to be rendered this plaintiff by the said Meyer, he should receive from plaintiff the sum of \$500.

"Sixth—That acting under and by virtue of said arrangement, agreement, and understanding, and relying upon the promises of the said defendants, and upon the terms aforesaid, on the 11th day of April, 1885, at said sheriff's sale, this plaintiff advised and instructed the defendant Meyer to bid at said sale, and said stock was purchased in trust for this plaintiff by the said defendants through and by the said defendant Meyer for the sum of \$20,200; that said Meyer, acting for plaintiff and the other defendant, and under plaintiff's instructions and advice, opened said stock of goods so purchased to the general trade and continued the sale of said stock at retail until on or about the month of April, 1886; that during said time said Meyer, upon the advice and instructions of this plaintiff, paid to the defendants Clark and the First National Bank the sum of \$20,200, with interest thereon at the rate of ten per cent per annum, previously advanced by the said Clark and the First National Bank in accordance with the agreement and understanding aforesaid; and also paid all costs and ex-

penses of carrying on said business; that in the month of April, 1886, said Meyer, for this plaintiff and under his advice and instructions, sold the entire remaining amount of said stock to one Joseph Shoenberg for the sum of \$10,000 in cash, and paid said amount so received to the defendant Clark and the First National Bank."

"Seventh— \* \* \* That said defendants John R. Clark, the First National bank, and Louie Meyer, in violation of all agreements with this plaintiff as aforesaid, ever since said sheriff's sale on April 11, 1885, up to the present time, and in breach of the trust on their part assumed on behalf of this plaintiff, have conspired together to cheat and defraud this plaintiff, and plaintiff alleges the fact to be that said defendants Clark and the First National Bank agreed with plaintiff to purchase said stock and advance the money as aforesaid, and so instructed and advised plaintiff as above set forth, and so procured the said defendant Meyer to purchase said stock in pursuance with the conspiracy previously planned by and between the said defendants to cheat, defraud, and deprive plaintiff of his rights in the premises, and in pursuance with such conspiracy to defraud and cheat plaintiff have failed and refused to render an accounting of the proceeds of said sale as above set forth, and have refused to pay over to this plaintiff the large amount of money in their hands arising from said sale, belonging to this plaintiff by reason of said agreement and trust aforesaid; that during all the times herein mentioned this plaintiff was unable to ascertain from the books of account the true account of the items of receipts and expenditures, as the same were kept by the defendant Meyer, and plaintiff was refused access thereto, so that plaintiff has no knowledge of the true amount owing by said defendants to this plaintiff.

"Eighth—Your petitioner further represents that although he from time to time applied to the said defendants, and requested them to come to a full and fair accounting

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with respect to the said transactions, with which just and reasonable request your petitioner still hoped that said defendants would have complied, as in justice and equity they should have done, but said defendants absolutely refused so to do. They have pretended that they have not received and applied to their own use more than their proportion of the proceeds received from said sales, whereas your petitioner charges the contrary thereof to be the truth, and so it would appear if the said defendants would set forth a full and true account and several their receipts and payments in respect of the said transactions heretofore set forth in this petition. Your petitioner charges that said defendants have in fact received the sum of \$20,000 and upwards beyond their proportion of the proceeds and profits of said sales. Wherefore this plaintiff prays that an account may be taken of all and every the said dealings and transactions from the time of the commencement thereof, and also an account of the moneys received and paid by the said defendants respectively in regard thereto, and that the said defendants may be decreed to pay to your petitioner what, if anything, shall upon the taking of such accounting appear to be due to him, your petitioner being ready and willing and hereby offering to pay to said defendants, or either of them, what, if anything, shall be due them or appear to be due them, or either of them, by this plaintiff. Plaintiff prays for such other and further relief as plaintiff may in equity be entitled."

In the answer filed these averments were denied, both by Meyer in one answer, and by Clark and the First National Bank jointly in another answer. Just preceding the commencement of the trial the plaintiff dismissed his action as to the representative of the defendant John R. Clark, he having died on or about August 2, 1890. At the conclusion of the trial, but before the rendition of judgment, there was filed in this cause the following request, omitting the formal parts: "Plaintiff requests a special finding of fact

as to whether the purchase made by Louie Meyer of the McConnell stock of goods at the sheriff's sale April 11, 1885, was made under any arrangement between McConnell, Meyer, and Clark, or either two of them; that the said goods were purchased in the interest of or to the use of John L. McConnell."

In the decree which was finally entered, the finding of fact requested is made in the following language: "And thereupon the trial of this cause proceeded, and after hearing the remaining testimony of witnesses adduced and the arguments of counsel is submitted to the court, on due consideration whereof the court finds for the defendants, and *finds specially that the defendant Louie Meyer, at the time he purchased the stock of merchandise at sheriff's sale, April 11, 1885, purchased the same without agreement to hold the same in the interest of or to the use of the plaintiff John L. McConnell, and finds no equity in the bill. Wherefore it is ordered, adjudged, and decreed that this action be dismissed at the cost of plaintiff.*"

The evidence as to the matters specially covered in this finding was very conflicting. On behalf of McConnell there was introduced in evidence many statements of Meyer directly substantiating, so far as he was concerned, the claim made in the petition as to the trusteeship of the said Meyer. On the other hand, there were equally convincing and numerous statements of the plaintiff McConnell, that while the goods were in the hands of Mr. Meyer he had no interest therein whatever. In fact, his testimony during the existence of the alleged trusteeship of Meyer with respect to the sale of the goods was upon a creditor's bill brought against McConnell and his wife; that he had no property whatever, and had turned over everything that he had any interest in to his creditors. Between McConnell and Meyer there seems to have been a rivalry as to which should be most successful in creating evidence by admissions contrary to his own interest. There was, however, no

party who relied upon these representations to his own injury, and, therefore, there was simply to be considered the statements of each of these parties as evidence in this respect. Of course, statements made by a party against his own interest are competent evidence in any case. Statements, however, in favor of the party's interest are not of equal competency.

To sustain the contentions of the First National Bank there were introduced in evidence the statements of John R. Clark made during his lifetime to several parties, to the effect that the claim made by McConnell was wholly unfounded, was unjust, false, and fraudulent in every respect. His answer containing averments to the same effect was also introduced in evidence after proof of his signature to the verification thereof. This class of testimony is wholly inadmissible, and has not been at all considered in reaching the conclusions at which we arrive—a course fully justified by the decisions of this court. (*Kennedy v. Otwe County Nat. Bank*, 7 Neb., 65; *Merchants Bank v. Rudolf*, 5 Neb., 527; *Nebraska City v. Lampkin*, 6 Neb., 32; *Mills v. Saunders*, 4 Neb., 190; *Gillette v. Morrison*, 9 Neb., 402.) This incompetent testimony being rejected, however, there still remained an irreconcilable conflict in the evidence, without a clear preponderance in favor of either party.

In view of the finding made upon the request of the plaintiff, the language of section 297 of the Code of Civil Procedure is not wholly without application to this controversy. The section referred to is as follows: "Upon the trial of questions of fact by the court it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial. In which case the court shall state in writing the conclusions of fact found separately from the conclusions of law." The record shows that an exception was taken to the find-

ing of the court upon the special request made. In the presentation in this court, however, it does not appear that any question of law arises upon this finding. There is simply a question of fact to be determined by a preponderance of the evidence.

In *McLaughlin v. Sandusky*, 17 Neb., on page 112, is the following language: "It is a well established rule of this court that the findings of inferior tribunals \* \* \* will not be interfered with unless clearly wrong. And this rule applies to cases brought into this court upon appeal as well as upon error. (*Armstrong v. Freeman*, 9 Neb., 11; *Richardson v. Steele*, 9 Neb., 483; *Cheney v. Eberhardt*, 8 Neb., 423.)"

In *Worthington v. Worthington*, 32 Neb., on page 338, the language of NORVAL, J., who delivered the opinion of the court, was as follows: "The trial court found the disputed question of fact against the plaintiff. It is impossible to reconcile the testimony, and it is quite evenly balanced. By seeing the witnesses and hearing them testify, the court below is better able than we to judge which witnesses were entitled to credit and who should be disbelieved. It is well settled in this state that a finding of the district court on conflicting evidence is conclusive on appeal to the supreme court, unless there is a clear preponderance of evidence against the finding. (*Brown v. Hurst*, 3 Neb., 353; *Helling v. Mortgage Security Co.*, 10 Neb., 611; *Courtney v. Price*, 12 Neb., 188; *Jennings v. Simpson*, 12 Neb., 558; *Aultman v. Patterson*, 14 Neb., 58; *McLaughlin v. Sandusky*, 17 Neb., 110.)" Following these authorities the special finding of the district court will not be reversed, but must wholly conclude the contention as to which the said finding was applicable.

3. The averments of the petition, as well as its prayer, were broad enough to cover any transactions between the plaintiff and either of the defendants. There is one branch of this case remaining, as to which the evidence seems to have

been introduced rather incidentally, and yet, in view of the petition, this phase of the case must receive attention, for it is not covered by the special finding. The relief granted might preclude our reviewing the matter upon which we are about to enter, if the evidence left any room for doubt as to the facts. The sheriff's sale, which occurred on April 11, 1885, was conducted by Mr. Melick, the sheriff of Lancaster county. This sheriff was sworn as a witness and testified that he took charge and control of the stock of goods formerly owned by John L. McConnell, about the 24th of March, 1885, and sold the stock on the 11th of April following; that he turned over to Mr. Meyer about \$942; that he had had some notes to collect, but whether the proceeds of any were included in this \$942 he was not able to remember; that he turned over this amount to Mr. Meyer simply as he turned over the stock to him; that he simply turned over everything that was in his possession; that Mr. Meyer told him that he, Meyer, was representing the bank; that witness simply sold the stock of goods to Louie Meyer and turned the store over to him, and made some collections along out of the sale of the stock, and sold some goods and turned over the proceeds of these collections and the proceeds of the goods to Louie Meyer; that he was in possession of the stock of goods by virtue of writs of attachment, and that the orders of the court were to advertise and sell the stock; that McConnell told witness that whatever Meyer did in the matter was satisfactory to him, and that he turned over the money to Meyer with McConnell's consent. When asked what McConnell said in giving his consent, this witness said: "I don't remember just what transpired at the time; only I remember that McConnell said to me that whatever Louie Meyer did in the matter would be satisfactory to him." Whether any of these conversations were in McConnell's presence the witness said he did not remember, but that he had no hesitancy, when he figured out what amount he had

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on hand, in turning it over to Meyer, when he was told it was satisfactory to McConnell, and that he gave Meyer a check in McConnell's store at the desk. The check to which witness refers was in the words and figures following:

"LINCOLN, NEB., 4-12-1885.

"Pay to order of Louie Meyer 942 $\frac{48}{100}$  dollars.

"\$942.48.

S. M. MELICK.

"To First National Bank, Lincoln, Nebraska."

Indorsement on back of check: "Louie Meyer." On face of check were the words: "First National Bank, Lincoln, Neb., April 15, 1885. Paid."

In relation to this same transaction Mr. Meyer testified that Mr. Melick told him that the \$900 paid was for goods they had sold while invoicing. He was then asked the following questions:

Q. Was there any understanding or agreement or knowledge on the part of John L. McConnell, so far as you know, that you was getting that \$900?

A. I don't know about that. I never had any agreement with McConnell in my life, of that kind.

Q. Did you have any understanding or agreement with McConnell that he was paying that \$900 to you?

A. No, sir.

Q. Or whether it should belong to him in any way?

A. It was a part of the attachment execution.

Q. Was there any agreement between you and him?

A. No, sir.

Q. That he should have it thereafter in any way?

A. Never.

Mr. Meyer further testified that he knew they did not make an invoice when he bought the stock. There had been an invoice made by the sheriff, he thought. Whether any of the goods had been sold, he learned from Sheriff Melick, who told him so; but that he never checked up the goods on the invoice to know whether what he got was invoiced or not. In relation to this matter John L. McConnell, the

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plaintiff, testified that the sheriff took possession the 24th day of March, and that the doors were closed from that time until the day of sale, April 11, so far as general business was concerned; it was not closed but what people came in and out; no sales were made at wholesale or retail that witness McConnell knew of; that the sheriff took an inventory, and that was all that was done; if anybody came around that was supposed to be a party that wanted to buy the stock they were allowed to inspect the stock; that when the sale was made on the 11th of April, the purchaser, Mr. Meyer, took possession of the stock immediately.

Upon payment of his bid Mr. Meyer received from Sheriff Melick a receipt, from which we quote as follows: "Received of Louie Meyer the sum of twenty thousand two hundred dollars, in payment of the goods, wares, merchandise, fixtures, safe, lamps, chandeliers, stove, and all the goods and effects of whatsoever name and nature situate in a certain store building known as the 'McConnell store,' being No. 1031 O street, in the city of Lincoln, Lancaster county, Nebraska, all of which goods and effects were struck off to said Meyer, he being the highest and best bidder under and by virtue of the following orders of sale and writs issued in the following cases, to-wit: 'In the district court of Lancaster county, Nebraska.' " Here follows a list of the titles of cases, sixteen in number, in each of which John L. McConnell was defendant. This receipt was dated April 13, 1885, and was signed "S. M. Melick, sheriff."

There was introduced in evidence no one of the processes under which the sheriff acted in the above matter; nor was there introduced any return of the sheriff as to the sale made April 11, 1885. The only official record or recitation we have as to what was really sold is contained in the receipt above quoted. This is not at all at variance with the testimony of any witness, but rather con-

sonant with all the testimony we have quoted so far as it relates to the sum of \$942.48 paid by the sheriff to Louie Meyer. In none of the evidence is there any showing whatever that McConnell or his creditors, or any of them, received any benefit on account of this payment by the check of the sheriff. It is shown by the testimony of McConnell, as to which there is no dispute on this point, that all the judgments against him have been satisfied; that of the firm of Bates, Reed & Cooley being settled last in order of time. In the light of all this testimony there is no room for doubt that the sheriff improperly paid this money to Meyer, and that Meyer has retained the same without the knowledge and acquiescence, so far as the evidence shows, of John L. McConnell. If this was an action against the said sheriff upon his bond for the recovery of this money wrongfully paid to Meyer, the testimony that the sheriff gave that he paid the money to Meyer with the consent of McConnell, might be pertinent. In this action, however, the suit is by McConnell, and Meyer alone, so far as this transaction is concerned, is liable. It matters not whether this money was paid to Meyer with the acquiescence and knowledge of McConnell or not; certain it is that, so far as the record shows, Meyer has never accounted for it. This action was brought for an accounting as between the plaintiff and all or any one of the defendants. The proofs clearly trace this money into the hands of Meyer. He has not shown that he has paid it to McConnell or in any way applied it to his benefit. There is not an intimation in any of this evidence which is quoted—which is in substance all there is in the record on this point—that Meyer bought anything but the stock of merchandise and certain stoves and other necessary furniture in connection therewith. It is not pretended that the goods were offered for sale by the invoice; rather they were offered for sale as they appeared upon the shelves and in the show-cases in the store-room in which they

had formerly been placed by McConnell. The sale of these goods in no way entitled the purchaser to anything except the goods themselves and such furniture as was actually sold in connection therewith. To allow a purchaser at such a sale to bid as against others upon goods which were actually in sight, and then after the purchase to permit the buyer to receive payment of money in the hands of the sheriff, which he should have applied to the satisfaction of claims which he held for collection under the orders of the court, would be to sanction a fraud, not only as against other bidders, but as well against the judgment defendant. This cannot be sanctioned. Nor by this reference to the sales made during invoice do we desire to be understood as sanctioning such a practice. Possibly, however, the sheriff was acting under an order of the court which allowed a private sale of the debtor's goods during invoice. We will not assume that he was without authority. The fact remains, however, that this money was received from the proceeds of the sales of goods and perhaps the collection of accounts due McConnell. In any event the money so received was the money of McConnell, which the sheriff should have devoted to the payment of his indebtedness, with the collection of which he was entrusted. He did not do so. The debts have been paid. Meyer has retained this money, and as no creditor seems, in the light of the evidence, to have an existing claim against this sum of \$942.48, it results that it should be paid by Meyer to McConnell. This money was received April 12, 1885, from which time interest at the rate of seven per cent per annum should be reckoned on the amount received. Computing this interest for eight years and a half,—a space of time a little short of what it really was,—the principal and interest amount to \$1,503.25, for which amount, with costs, plaintiff is entitled to judgment as against the defendant Louie Meyer.

In addition to the above item, the plaintiff claims that he

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should have judgment against the defendant Meyer for the value of the stove, the safe, and other furniture. It will be noted that these were either expressly enumerated in the receipt given by the sheriff to Meyer, or were covered by the comprehensive description of the property which Meyer purchased at the said sheriff's sale.

The judgment of the district court is reversed, and a decree will be entered in this court against the First National Bank of Lincoln, Nebraska, for the sum of \$199.87, with interest at seven per cent per annum from the date of the filing hereof, without costs; and against Louie Meyer for the sum of \$1,503.25, with interest from the date of the filing hereof at the rate of seven per cent per annum thereon.

DECREE ACCORDINGLY.

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J. R. LICHTY v. J. C. MOORE ET AL.

FILED NOVEMBER 8, 1893. No. 4715.

1. **Negotiable Instruments: RIGHTS OF GUARANTOR: SURETIES.** The mere fact that a guarantor of a promissory note, at the request of the principal maker of said note, received the amount loaned thereon and paid it in the discharge of a judgment against said principal maker, whereby the lien of said judgment, paramount to that of a mortgage held by said guarantor upon real property of said principal maker, was released, there being no fraud or circumvention shown, does not affect the right of said guarantor to recover the amount which he has been compelled as such to pay, even though the parties whom he sues as makers of said note were stay sureties on the judgment so paid; and this rule is not qualified by the mere fact that the parties so sued were in fact but sureties on the note with the party who instructed said guarantor to make payment as aforesaid.
2. ——— : **SURETY ON STAY BOND: SUBROGATION.** A stay surety

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is not entitled to be subrogated to the rights of the holder of a stayed judgment merely by reason of the fact that such stay surety has signed a note as surety with the judgment debtor, upon which note the money has been loaned with which payment of the stayed judgment was made.

3. ———: ACTION BY GUARANTOR FOR REIMBURSEMENT: DEFENSE: VOLUNTARY ASSIGNMENTS. In a suit by a guarantor for reimbursement of the amount which, by reason of such guaranty, he has been compelled to pay, it is no defense that the original payee of the note, as assignee of the estate of the principal maker thereof (for whom the defendants claim they are but sureties), wasted the estate of said principal maker so that he could not pay as he otherwise could, the said assignee having duly accounted, and been duly discharged by the court which appointed him such assignee.
4. Trial: DIRECTING VERDICT. Where the defenses pleaded are wholly unsustained by the evidence, it is error for the trial court to direct a verdict in favor of the defendants.

ERROR from the district court of Thayer county. Tried below before MORRIS, J.

*O. H. Scott and Hambel & Heasty*, for plaintiff in error.

*Manford Savage and S. A. Searle*, contra.

RYAN, C.

In the district court of Thayer county, Nebraska, J. R. Lichty brought suit against J. C. Moore, James M. Moore, John Kinney, and G. Heinrichson, alleging as his cause of action that upon the request of the defendants he had guarantied, and been compelled to pay about eighty-seven per cent of the amount of a promissory note of which the defendants were the makers. The note in respect of which suit was brought was in the words and figures following:

“\$285. DAVENPORT, NEB., January 1, 1886.

“Six months after date, I, we, or either of us, promise to pay to Jacob F. Walker, or order, two hundred and eighty-five dollars, for value received, negotiable and payable

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without defalcation or discount, with interest at the rate of ten per cent per annum from date until paid.

"If suit is instituted on this note we agree to pay ten per cent of the amount then due, as agreed, assessed, and liquidated damages for non-fulfillment of contract, the same to be allowed by the court and included in the judgment.

J. C. MOORE.

"JAMES MOORE.

"JOHN KINNEY.

"G. HEINRICHSON."

The defendants John Kinney and G. Heinrichson answered, first, admitting their signatures upon the note sued on, but alleging that they signed as sureties only, and that Walker, the payee, was well aware of that fact at the time the note was signed, and that plaintiff well knew it long before he paid said note, if he ever paid the same. There was also a denial by these two defendants of each averment in the petition not admitted by the answer. There were other defenses pleaded, but as there were only two in support of which evidence was adduced, they alone will be considered. In passing, it may be remarked that there was a reply which put in issue each averment of these matters, to which attention will now be directed.

In the answer the two defendants above named made the following averments: "That on March 25, 1886, James Moore and J. C. Moore, who are the principal makers of said note, made an assignment of all their property for the benefit of their creditors in accordance with law; that within ten days after said date the said Jacob Walker was appointed assignee of said estate and took possession of the property belonging thereto. The assets of said estate amounted to the sum of \$20,000, and the debts to the sum of \$11,000, at the time the said Walker took possession of the same as aforesaid; that within the time provided by law the said Jacob Walker, without the consent

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of these defendants, filed said note as a claim against the said estate, and has paid to himself from the assets of said estate two dividends upon the note aforesaid, and at the time said note became due and payable the said Jacob Walker had in his possession money and property largely in excess of the debts of the said principal makers of said note; that said estate yet remains unsettled, and a large amount of assets are in the hands of said Jacob Walker, the amount of which is unknown to these defendants.

"The defendants further allege that they are informed and believe that the said Jacob Walker has so managed the estate of the principal makers of said note that the district court of Nuckolls county refused to confirm the sale of the real estate belonging thereto, and that said Jacob Walker has charged excessive fees, and that while said estate, if properly managed, would have paid the debts of said James Moore and J. C. Moore in full, through the mismanagement of said Jacob Walker, the said estate has paid the creditors only thirteen cents on the dollar, and not to exceed ten cents more on the dollar will be realized therefrom. Defendants were led to believe that when said Walker filed said note against said estate it would be paid in full, and they had no means of knowing the condition of said estate, and that all knowledge of the same was kept from them by the payee of the note, who was the assignee of said estate; that said Walker made no attempt to collect said note from the plaintiff, or any one else, until he had, by mismanagement as aforesaid, exhausted the property of the principal makers of said note."

Perhaps it is unnecessary to remark that the Jacob Walker above referred to was the payee of the original note. The evidence discloses on this head that said Walker was constituted the assignee of the estate of J. C. Moore and James Moore, and that the assets consisted of a large amount of property, both real and personal. There were in evidence certified copies of the reports filed by the assignee

during the progress of the administration of the estate of said insolvent parties, followed by his final report and the approval of the same, together with an order of discharge of the said Walker as such assignee. During the administration of said estate there were two dividends declared, amounting in the aggregate to about thirteen per cent of the claims filed; and for this thirteen per cent due credit was given by plaintiff in his petition, as he only sued for the balance of about eighty-seven per cent due on said note. In this condition of the pleadings we are at a loss to conjecture what defense the averments constituted, in an action brought by Lichty upon a note which he had guarantied at the request of at least one of the makers, though without the express assent of the others, and which, by reason of the failure of the makers so to do, he had been compelled to pay. If Walker mismanaged the estate of the insolvents Moore and Moore, that fact should have appeared in some manner in the county court. In this action there was no malfeasance shown. The testimony simply was that the Mill property, for instance, was of a certain large value, about \$14,000; that thereon was a mortgage of \$2,000; that the property afterwards sold on a foreclosure in the federal court for about \$2,600. If there was any element of misfeasance or malfeasance with respect to this, the great bulk of the property of the Moores, it must have occurred in allowing the foreclosure and sale upon the mortgage. But this was a matter that was within the jurisdiction of the federal court; and if the property was unfairly sold, or had been unnecessarily sacrificed, the proper forum in which to present that matter would have been the circuit court of the United States for the district of Nebraska.

Another defense pleaded by Kinney and Heinrichson was in the following language:

"13. That the plaintiff did not write his alleged guaranty upon said note at the request of either of the makers of the same, nor of the sureties thereto, but the name of the

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plaintiff was thereon placed by the plaintiff in order that the plaintiff could procure the money advanced on said note to use for his own benefit; and the plaintiff did use said money, and the same was used to pay off a lien on said property of the principal makers of said note in order that the plaintiff should have the first lien upon the property aforesaid, and the indorsement was made on said note by the plaintiff for the benefit which he was to receive, and which he did receive therefrom."

J. F. Walker testified that Mr. Lichty signed the guaranty in his presence at the request of Mr. Moore. His language is as follows: "Mr. Moore came down twice, and had this note signed with these sureties on. I told him I was not acquainted with the sureties, and he went home and came back the second time with a letter from the bank which said these sureties would be good for a reasonable amount; and I still refused, for I was not acquainted with them, and in our conversation he wanted to secure this note, saying, he could not get the money; and in that conversation he mentioned Lichty and said he was acquainted with Lichty. I believe I asked him if Lichty knew these parties, and he said he did; and I offered if he could get Lichty to guaranty this note I would give him the money on that, and he went out to see Lichty." This witness further said that he told Moore that if he would get Lichty to guaranty the note witness would let him have the money; and that Lichty had paid the note. There is no evidence in conflict with this, and it must, so far as it goes, stand as a verity.

In relation to the use made of the money, there is no question that it was paid to satisfy certain judgments which were liens upon the property of J. C. and James Moore. In fact, the evidence is without contradiction that the money was borrowed for this very purpose. The payment of it to Mr. Weiss, the attorney for the judgment creditors, was made by Mr. Lichty, but his instructions in that regard

allowed him no discretion in the matter. The proceeds of the note were entrusted to him to be paid on these judgments. It is true, perhaps, that if there had been an assignment of these judgements for the benefit of the sureties so that the judgments would not have been discharged it might have inured to the benefit of the defendants who have made this answer. The defendants in error insist that it was the duty of Mr. Lichty to procure such an assignment of the judgments to be made to the answering defendants, because they were sureties on the stay bond in respect to such judgments. But it is obvious that the loan was made by Walker to the principal debtors, both in the note and in the judgments to be satisfied. Upon request of one of the principal defendants, Mr. Lichty made the payments upon such judgments. It might have been that if the sureties upon the stay bond, as well as upon the note, had advanced the money to make these payments, an equity entitling them to subrogation would have arisen in their favor. But such was not the case. They in no manner were instrumental in procuring this money, except as sureties for J. C. and James Moore. Collateral to their liability was also the liability of Lichty, a guarantor; and, so far as the disposition of the money raised upon this note was concerned, there would seem to be fully as much equity in favor of Lichty as in favor of Kinney and Heinrichson. The fact that incidentally, by the payment of the two judgments referred to, there were released liens prior to the mortgage lien held by Lichty upon the same property, would not impair his rights in an action of this kind. If Kinney and Heinrichson are entitled, in equity, to be subrogated to the lien of the judgments extinguished by the payments made by Lichty, their remedy lies in a proper action brought for that purpose. We cannot see, however, that they have any standing in this case to set up the fact of such payments as a defense against the liability attempted to be enforced by Lichty upon the note.

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These defenses were the only ones in support of which any evidence was presented. Upon the issues joined the court instructed the jury as follows: "Upon the uncontradicted facts in evidence herein the plaintiff cannot recover against the defendants John Kinney and G. Heinrichson; but defendants J. C. Moore and James Moore, having failed to answer, the plaintiff will be entitled to recover judgment against them for the amount he paid to Jacob Walker on the note in question in this action, and interest on said payments according to the tenor of the promissory note herein, less the amounts, if any, which have been paid on said note, from the time of such payments to the first day of this term of court, to-wit, April 23, 1890." To this instruction there was due exception, and its correctness is sufficiently challenged by a motion for a new trial, overruled in due course, and properly excepted to, followed as this was by a judgment on the verdict in accordance therewith.

A review of the defenses set up in the answer, and of the evidence in support of each, is attended with considerable difficulty, owing to the fact that the instruction complained of does not definitely point out any grounds upon which the trial court acted in withdrawing the cause from the consideration of the jury. It has been necessary, therefore, to consider all the defenses in support of which there was any evidence given. There is no doubt from the testimony that the note was made by the defendants in this action, and that it was guarantied by Lichty, and that he, induced by threats of legal proceedings, paid the same. The matters attempted to be asserted in resistance of contribution by the parties to the note constitute, under the evidence given, no defense.

From the views above expressed it necessarily follows that the judgment of the district court is

REVERSED.

## LEWIS S. LOOMER V. SABERT THOMAS.

38	277
43	595

FILED NOVEMBER 8, 1893. No. 4635.

1. **Breach of Contract: NEGLIGENCE IN PREVENTING DAMAGES.** The law imposes upon a party injured from another's breach of contract or tort the active duty of making reasonable exertions to render the injury as light as possible. If by his negligence or willfulness he allows the damages to be unnecessarily enhanced, the increased loss, which was avoidable by the performance of his duty, falls upon him. *Long v. Clapp*, 15 Neb., 417, followed.
2. ———: ———: **SETTLEMENT AND COUNTER-CLAIM: INSTRUCTIONS.** This was a suit for balance due on account of pasturing cattle. The defendant pleaded (a) settlement; (b) counter-claim for damages sustained by loss of and injury to cattle on account of plaintiff's negligence. The instructions of the court to the jury on the subject of the defenses of settlement and counter-claim approved and set out at length in the opinion.

ERROR from the district court of York county. Tried below before SMITH, J.

The opinion contains a statement of the facts.

*E. A. Gilbert*, for plaintiff in error :

Cross-examination is limited to the facts elicited by the examination in chief. (*Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610.)

When a cross-examination is carried to an unreasonable length upon new matters, and thereby improper testimony is obtained, it is error. (*Bell v. Prewitt*, 62 Ill., 362.)

The court erred in giving the seventh, eighth, and ninth paragraphs of instructions. (*Brewer v. Wright*, 25 Neb., 305; *Price v. Mahoney*, 24 Ia., 582; *Smith v. Evans*, 13 Neb., 314; *McCleneghan v. Omaha & R. V. R. Co.*, 25 Neb., 523.)

*Sedgwick & Power*, contra, cited: *Long v. Clapp*, 15 Neb., 420.

RAGAN, C.

Sabert Thomas sued Lewis Loomer in the district court of York county, to recover \$562.80, less \$200 paid by Loomer, for a balance due on contract for pasturing Loomer's cattle during the summer of 1889, at sixty cents per head per month.

Loomer made four defenses :

1. That the price for pasturage agreed upon was fifty-five cents per head per month, instead of sixty cents.

2. That he had been damaged on account of improper care of the cattle while Thomas had them in pasture, and on account of Thomas allowing some of the cattle to escape and become lost.

3. That there had been a settlement between the parties, and that the amount due Thomas had been agreed upon, which amount should not be paid until the lost cattle had been returned by Thomas.

4. That he had paid Thomas \$300 instead of \$200.

To these defenses Thomas replied by a general denial of all the allegations of new matter in the answer.

Thomas had a verdict and judgment, and Loomer brings the case here.

The first error assigned is, "The verdict is not sustained by the evidence."

A number of witnesses testified in the case, and the evidence on every issue is more or less conflicting. Thomas' evidence sustains his theory of the case, and Loomer's evidence sustains his defenses. It is not so much a question of the sufficiency of the evidence. The question is largely one of the credit of the witnesses and the weight of the testimony. Now, this court did not hear the witnesses testify; had no opportunity to observe them, or their manner of testifying, or their demeanor while on the stand. The jury heard, saw, and observed the witnesses, and weighed the evidence, and reached a conclusion. For the supreme

court to disturb this verdict because, had we been the triers of the issues of fact, we might have reached a different conclusion, would be for the court to usurp the functions of the jury. It has long been settled in this state that the supreme court has no authority to set aside the verdict of a jury unless the same is clearly wrong. For this court to interfere with a jury's conclusion it must be unsupported by competent evidence. It is not enough to cancel a verdict, that all the evidence on which it rests is conflicting. This court cannot weigh the conflicting testimony of witnesses. The jury alone can do this.

The next error alleged by Loomer is that Thomas was permitted to cross-examine him upon matter not testified to by him, Loomer, in his direct examination. We have carefully examined the record as to this assignment of error, and it must suffice to say that the cross-examination complained of was fairly limited by what Loomer had testified to when on the stand. True, the cross-examination was perhaps longer than necessary, but we do not think that Loomer was deprived of any right thereby.

The remaining errors assigned relate to the giving by the court of instructions 7, 8, and 9. They are as follows:

"7. If you believe from the evidence that the defendant delivered a large number of cattle for pasture to the plaintiff, and there was no definite or certain agreement between the parties as to how long plaintiff should keep said cattle, then defendant had the right to take possession of said cattle at any time; and if you further believe from the evidence that, during the time plaintiff had said cattle in his pasture, the defendant frequently saw said cattle and knew that plaintiff was neglecting to water and properly care for said cattle, and knew that by reason thereof said cattle were being injured, or that the defendant was being damaged thereby, then the law imposes upon the defendant the active duty of making reasonable exertions to prevent the damages and render such injuries or damages, if any,

as light as possible ; and if, by his own negligence or carelessness, defendant permitted said damages to be unnecessarily enhanced, the increased loss, if any, must be borne by the defendant.

“8. If you find from a preponderance of the evidence that the defendant is entitled to recover damages on account of negligence of the plaintiff in looking after and caring for defendant's cattle, if any such is proved, then the measure of the defendant's damages would be what said cattle are impaired and depreciated in value, if any such you find, and the value of the cattle lost or that died, if any such you find, on account of the negligence of the plaintiff, provided you further find from the evidence that such loss or damages occurred without any fault or neglect on the part of the defendant.

“9. In order to constitute a settlement it must appear from the evidence that the parties expressly or impliedly agreed upon a balance due, and, although you may believe from the evidence that on or about the 8th day of October, 1889, the parties met together and looked over their accounts and struck a balance, this would not be binding upon the parties as a settlement unless you further find from the evidence that both the parties then agreed or understood that such balance should be regarded as the amount due from the defendant to the plaintiff.”

We perceive no error in any of these instructions.

Plaintiff in error's chief complaint, however, is directed to No. 7. In Sutherland on Damages, vol. 1, p. 148, it is said: “The law imposes upon a party injured from another's breach of contract, or tort, the active duty of making reasonable exertions to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, that was avoidable by the performance of his duty, falls upon him.” The instruction complained of is within the rule here laid down. This rule has also received the

approval of this court. (See *Long v. Clapp*, 15 Neb., 417; *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb., 68.)

There is no error in the record and the judgment of the district court must be affirmed, and it is so ordered.

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY  
V. CHARLES MOSCHEL.

FILED NOVEMBER 8, 1893. No. 4645.

1. **Amendments to Pleadings: DISCRETION OF TRIAL COURT.**

The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court; and unless it is made to clearly appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defense, the supreme court will not interfere.

2. ———. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense or an additional cause of action.

3. **Railroad Companies: DAMAGES TO REAL ESTATE BY CONSTRUCTION OF ROAD: LIMITATION OF ACTIONS.** An action against a railroad company for damages to plaintiff's real estate caused by the railroad company's building its tracks and operating its road across the street and on a lot lying next to plaintiff's property, must be brought within four years of the date of the construction of such railroad.

4. ———: **NUISANCE: DAMAGES: LIMITATION OF ACTIONS.** Where a railroad company, in 1880, built its railroad track and side tracks across a street and on a lot (owned by it) lying next to plaintiff's property, and more than four years thereafter plaintiff brought suit against the railroad company for the depreciation in value of his lot caused by the building of such railroad, and its subsequent operation, and for subsequently building and operating additional tracks across said street and lot, *held*, (1) that plaintiff in no event could recover for any depreciation in the value of his property by reason of any acts of the railroad

38	281
38	415
38	281
42	99
38	281
144	599
38	281
48	90
38	281
54	243
38	281
57	133

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company, either in matters of construction or operation, the habitual doing, or the commencement of the doing, of which acts was at a date more than four years prior to the date of suit brought; (2) that the plaintiff could, and if he did or did not, within four years after the date of building of said original railroad on said lot and across said street adjacent to his property, bring suit for damages for the depreciation in value of his premises, caused by such railroad construction and operation, then every element of damages, past and future, that was or would have been properly admissible in that suit, either in matters of construction or operation, must be excluded from the consideration in this case.

ERROR from the district court of Gage county. Tried below before APPELGET, J

*J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.*

*Rickards & Prout, contra.*

RAGAN, C.

On the 5th day of December, 1889, Charles Moschel sued the Omaha & Republican Valley Railroad Company (hereinafter designated as the "railroad company") in the district court of Gage county, alleging his ownership of lot 6, in the city of Beatrice; that said lot had a frontage of fifty feet on Court street, the principal street of said city; that about January 7, 1880, the railroad company constructed, and had since maintained, its line of road upon lot 5, adjacent to said lot 6, and had extended its road and side tracks upon and across said Court street, making a double track upon said lot 5, and said street in front of Moschel's building, situate on said lot 6 (lot 5 is immediately west of lot 6, and both front south on Court street, and the railroads mentioned extend north and south across Court street and upon lot 5); that ever since the building of said railroad, the railroad company had occupied the street in front of said place of business of Moschel and

said lot 5 with its tracks and side tracks, made up its trains thereon, and interfered with the travel on said street; "and that particularly within the four years last past, and immediately preceding the commencement of this action, said railroad company had wilfully, maliciously, and wantonly, with the intent to injure plaintiff in his business and property, caused its engines and cars to be left alongside of said property of Moschel, without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property; that said property of Moschel had been greatly damaged, and the free use and occupation of said property interfered with, and Moschel had been compelled to abandon the doing of business on said lot 6, and at a great expense to purchase other property on which to conduct his business; that said lot 6, by reason of the premises, had been greatly injured and depreciated in value for any purpose whatsoever, and Moschel prayed judgment for damages."

The answer of the railroad company admitted the construction, maintenance, and operation of its double track railway across Court street and upon lot 5 since 1880, and alleged that it had, for due compensation paid, procured the right of way over said lot 5 before occupying it, and specifically denied all other allegations of Moschel's petition.

After the evidence was all in, the railroad company requested permission to file an amendment to its answer, setting up the statute of limitations, which the court granted; and thereupon the railroad company filed the following "amendment," in fact, an additional defense: "The defendant, in further answer to the petition of the plaintiff, \* \* \* alleges that the cause of action stated in the petition did not accrue within four years next before the commencement of this action."

Thereupon Moschel, by leave of the court, amended his

petition by filing what his counsel called an "addenda" thereto, in words and figures as follows: "Comes now the plaintiff, for their 'addenda' to the \* \* \* petition herein filed, \* \* \* and \* \* \* says that on or about the 1st day of October, 1886, the defendant constructed a second or new main line over and across the said lot 5, and only a few feet distant from the line constructed by the defendant in the early part of 1880, so that said new main line, and the operation thereof, extended along the east side and in close proximity to plaintiff's said premises, and over and across Court street, and that by reason of which said new main line of the defendant, the said Court street in front of plaintiff's premises was still blockaded, the full use thereof destroyed, the travel thereon impeded, whereby the value of said plaintiff's premises was still further reduced, so that the same was not worth within \$1,200 of what they were immediately preceding the construction and operation of said new main line as herein described."

The railroad company excepted to the ruling of the court allowing this amendment. Moschel had a verdict and judgment, and the railroad company brings the case here.

The first error alleged is the ruling of the court in permitting Moschel to amend his petition by filing the so-called "addenda."

Moschel's petition contained two causes of action, though not separately stated, and numbered:

1. The depreciation in the value of lot 6 by the construction, in 1880, by the railroad company, and its operation and maintenance since, on lot 5, and across Court street, of its railroad and side tracks.

2. That within the four years immediately preceding the bringing of this action the railroad company had willfully, maliciously, and wantonly, with the intent to injure Moschel in his business and property, caused its engines and cars to be left alongside of said property, without reason or necessity therefor, by reason whereof said property

had been greatly damaged, and the plaintiff deprived of his free use and occupation of said property.

The facts stated in the "addenda" are that in October, 1886, the railroad company "constructed a second or new main line over and across said lot 5 \* \* \* and Court street, \* \* \* whereby the value of Moschel's premises was reduced \* \* \* \$1,200."

The facts stated in this "addenda" then were not amendatory of either of Moschel's causes of action, but of themselves stated a separate and independent cause of action.

The entire subject of permitting or refusing amendments to be made to pleadings is, by law, left to the sound legal discretion of the trial judge; and unless it is made to clearly appear that the court has abused its discretion, or that by his ruling a party has been deprived of the opportunity to make his case or defense, the supreme court will not interfere with the action of the trial judge. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense, or an additional cause of action. If the trial court in the case before us had refused to permit the railroad company to file its additional defense of the statute of limitations, or had refused to permit Moschel to file his additional cause of action, we could not say that the court had abused its discretion; and we cannot say that the court erred in permitting either of the amendments to be filed.

In all such cases, if a party claims himself prejudiced by the refusal of a trial court to permit an amendment, such prejudice must appear from the record; and if amendments are permitted by the trial judge during the progress of a trial before verdict or decision, and a party is prejudiced by such amendment in the making of his case or defense, he should make such prejudice appear by affidavit or otherwise to the trial judge, and then it would be his duty, on such terms as were reasonable, to either set aside the trial proceedings already had, and continue the case to a

future time, or suspend the trial until such time as the party claiming to be prejudiced might, by the exercise of reasonable diligence, be prepared to make his defense or case.

The next error assigned by the railroad company is the refusal of the trial court to give to the jury this instruction: "The court instructs the jury that if any damages are to be assessed in this case, no damages can be allowed for the depreciation of the value of the property in question, except such depreciation, if any, as is shown by the evidence to have resulted within and during the four years immediately prior to the commencement of this action on the 5th day of December, 1889; but for any depreciation or damage prior to said four years you can make no allowance." The refusal to give this instruction was error for the reasons: (1) The first cause of action in Moschel's petition was the alleged depreciation in the value of his lot 6, by reason of the railroad company having, in 1880, constructed and since operated its railroad on lot 5, adjacent to Moschel's lot. The undisputed evidence in the case is that the railroad company had, prior to building its tracks on lot 5 in 1880, purchased said lot. The railroad company then was in the same situation, so far as concerns the question of damages to Moschel's property, as it would have been had it acquired the right to use and occupy lot 5 by condemnation proceedings; that is to say, the railroad company had not wrongfully occupied and used lot 5. It was not a trespasser; and all the damages done to Moschel's property by the location and proper, usual, ordinary, and necessary operation by the railroad company of its railroad on the lot 5, and across Court street, accrued at the date of the building of the railroad in 1880, and hence were barred by the statute of limitations, and could not be recovered in this action. (Mills, Eminent Domain, sec. 216; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill., 203.) (2) A very large part of Moschel's evidence was directed to the depreciation in the value of his lot, caused by the building of the railroad on

lot 5, and across Court street, in 1880, and its maintenance and operation thereof since. (3) The court, at the request of Moschel, had already instructed the jury as follows: "You are instructed that if you find from the evidence in this case that the defendant constructed and operated the line of road across the lot adjoining that of plaintiff, now in question, and if you further find from such evidence that by said construction and operation of said road the lot of plaintiff was injured and decreased in value, then you should find the damages to the lot to be the amount which you may find that the evidence shows that said lot was decreased in value by reason of such construction and operation." This last instruction left the jury at liberty, if it did not direct them, to take into consideration, in estimating Moschel's damages, the depreciation in value of his lot by the building of the railroad in 1880. The language of this instruction should at least have been limited by such an instruction as the one asked by the railroad company and refused. (4) There was no evidence before the jury that would justify their finding, as Moschel alleged in one of his causes of action that the railroad company had at any time "willfully, maliciously, and wantonly, with the intent of injuring plaintiff in his business and property, \* \* \* caused its engines and cars to be left alongside the property of the plaintiff, without reason or necessity therefor, and for the purpose of injuring plaintiff in the full, free, and complete use and enjoyment of his property."

It is strenuously insisted here by counsel for the railroad company that this case is to be viewed as if Moschel had, within four years after the building of the tracks across Court street and lot 5, in 1880, sued the railroad company for damages for depreciation of his property caused by such building; and that the judgment in such a case, had it been brought, would be a bar to this action, and therefore this suit cannot be maintained.

It is doubtless true, (1) that in this case Moschel cannot

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Richardson & Boynton Co. v. Winter.

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recover for any depreciation in the value of his property by reason of any acts of the railroad company, either in matters of construction or operation, the doing, or commencement of the doing of which acts was at a date more than four years prior to the date of the suit brought; (2) that the owner of said lot 6 could, and if he did or did not, within four years after the date of the building of said railroad on said lot 5, and across said Court street, bring suit for damages for the depreciation in the value of his property, caused by such construction and operation of said railroad, then every element of damages, past and future, that was or would have been properly admissible in such suit, either in matters of construction or operation, must be excluded from consideration in this case.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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**RICHARDSON & BOYNTON COMPANY V. PHIL E. WINTER.**

FILED NOVEMBER 8, 1893. No. 5045.

**Review: INSTRUCTIONS: EXCEPTIONS: ASSIGNMENTS OF ERROR.**

To obtain a review by the supreme court of an alleged erroneous ruling of the district court in the giving or refusing of an instruction, an exception must be taken to such ruling at the trial, and specifically assigned as error here in the petition in error.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

*Burke & Prout* and *J. N. Rickards*, for plaintiffs in error.

*A. D. McCandless* and *Winter & Kauffman*, contra.

RAGAN, C.

The Richardson & Boynton Company sued Phil E. Winter in the district court of Gage county on a promissory note for \$100. Winter answered, and, after admitting the execution and delivery of the note, alleged that there had been an entire failure of consideration for said note, and that the defendant had received no value whatever for the same; that prior to the giving of said note the plaintiffs had placed a certain hot-air furnace in the defendant's residence on trial, to be accepted and paid for by the defendant only in case it should heat defendant's residence in a manner to meet plaintiffs' guaranty and defendant's requirements after a thorough test in the coldest weather; that said furnace utterly failed to do the work guaranteed and the defendant rejected the same and refused to purchase it, and placed it at the disposal of the plaintiffs; that the plaintiffs thereupon acknowledged the complete failure of the furnace, as set and constructed, to meet their guaranty, but represented to this defendant that such failure was owing to certain deficiencies in the furnishings and its defective and improper connections, and faulty constructions of the building of the air-boxes, chambers, and dampers; and said plaintiffs then promised, agreed, and contracted with the defendant that if he would give them the said note \* \* \* they would, within and during the thirty days for which it was drawn, supply all deficiencies fully, remedy all defects, correctly establish all connections, and thoroughly reconstruct the entire setting of said furnace so that it could and would heat all the seven rooms in defendant's residence at the same time, in the coldest weather, in a manner satisfactory to the defendant; time being of the essence of the contract, and the time limited to the time of defendant's note, to-wit, thirty days; and defendant avers that this promise and agreement by the plaintiffs formed and was the sole inducement upon which he gave

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the note in question; \* \* \* and defendant avers that plaintiffs did not, within said thirty days, nor at any time, fulfill their said agreement, and did not, in any particular, reconstruct \* \* \* said furnace, and defendant has never since made, and cannot make, any use of said furnace; \* \* \* and defendant avers that to properly reconstruct said furnace would cost him the full amount of said note; that by plaintiffs' false and fraudulent representations as to the value and heating condition of said furnace, defendant was led to incur heavy expense, and to greatly damage his residence by apertures in the walls, floors, and partitions; and by reason of plaintiffs' failure to perform their said contract and to make good the said heating apparatus, the defendant had been damaged in a large sum, to-wit, more than one hundred dollars.

There was a reply denying all the allegations of new matter in the answer. The case was tried to a jury, who found for Winter, and the Richardson & Boynton Company prosecute error.

One error alleged is that the verdict is not supported by the evidence. We think it is. We shall not quote the evidence. It is, of course, more or less conflicting, but abundantly supports the jury's findings. It is now a settled rule of this court that it will not disturb the verdict of a jury if there is competent evidence to support it; nor will this court weigh the conflicting testimony of witnesses. We cannot say that the verdict is clearly wrong, and therefore cannot disturb it on the ground that it is unsupported by the evidence.

Another error alleged is the giving, by the trial court, of an instruction. The giving of this instruction, however, is not assigned as error in the petition in error, and for that reason we cannot examine it.

At the request of plaintiffs in error the court instructed the jury as follows: "The court instructs the jury that although you may find from a preponderance of the evi-

dence in this case that the furnace in question was sold by the plaintiffs, and that said furnace was improperly set, and that the registers and other fixtures and appurtenances belonging to said furnace were improperly arranged and located, and that consequently defendant's house was damaged and not heated, still the jury cannot, under the law, allow the defendant any damages in their verdict because of such defects in the setting, arrangements, and locating of said furnace; provided the jury believe that said furnace, registers, fixtures, and appurtenances were placed where defendant requested them to be placed." To this instruction the court added, "and that such failure was caused by the order of defendant." The addition made by the court is another error assigned here. It is sufficient to say that there was no error in this modification of the instruction.

Complaint is made because of the refusal of the court to give this instruction: "The jury are instructed that if they believe from the evidence that the witness Ham was in the employ of the witness Labell, and that as such employe he ordered the furnace which was afterwards put in the house of the defendant with knowledge of the said Labell, that said furnace was shipped and billed to said Labell and accepted, and the freight thereon paid by him, you are instructed that such acts on the part of the said Labell are a ratification of the purchase of said Ham, and such ordering and purchasing was, in law, the acts of said Labell as much as though he had ordered the same in person." The contention, or one contention of the plaintiffs in error, at the trial below, was that they sold the furnace to one Labell, and not to Winter; that one Ham was in Labell's employ, and gave plaintiffs in error the order for the furnace for Labell. Plaintiffs in error had no pleading on file under which they could prove any such facts, but the evidence was allowed to go in. If this was a suit by the Richardson & Boynton Company against Labell for the price of the furnace, the instruction might have been

proper, but certainly it was not error on the part of the court to decline giving it in this case.

Again, the court fully instructed the jury as to plaintiffs in error's contention that they sold the furnace to Labell, as follows: "The court instructs the jury that if they find from the evidence that the furnace in question was sold by the plaintiffs to one Labell, and that the note in question was received by the plaintiffs in payment of said furnace, then the jury must find a verdict for the plaintiffs for the full amount of the note, interest and principal, unless the jury further find from a clear preponderance of the evidence that said plaintiffs agreed to change said furnace as alleged in defendant's answer, and that such agreement was the consideration for said note, and also that the plaintiffs failed to make the agreed changes in said furnace."

The last error assigned is the refusal of the court to charge the jury as follows: "The court instructs the jury that if you believe from the evidence that the defendant has sworn positively that at the time the note in question was delivered, the witness McPherson represented to the defendant that the plaintiffs would reset, reconstruct, and make alterations in the furnace and heating arrangements placed in defendant's house, and furnish repairs therefor, within thirty days, and before the maturity of said note, as alleged in this answer, and that the witness McPherson has sworn just as positively that he did not make such representations to the defendant, and if you further find from the consideration of all the evidence in the case that the testimony of the witness McPherson is entitled to as much credit as that of the defendant, and corroborated to the same extent, then, so far as the question of said representation is concerned, you should find for the plaintiffs, as the burden of proving said representation is on the defendant." Such an instruction as this should never be given to a jury, and the court was entirely right in refusing to give it. The court, at the request of plaintiffs in error, had

already charged the jury as follows: "The court instructs the jury that in determining the issues in this case you should take into consideration the whole of the evidence and all the facts and circumstances proved on the trial, giving the several parts of the evidence such weight as you think they are entitled to; and, in determining the weight to be given to the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appears, their appearance on the stand, the reasonableness of the story told by them, and all the evidence and circumstances tending to corroborate such witness, if any such are proved." This instruction correctly and fairly stated the rule and was all plaintiffs in error were entitled to on the subject of the credibility of the witnesses, and the weight of the evidence.

There is no error in the record and the judgment of the district court is

**AFFIRMED.**

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**COLUMBUS C. VENNUM ET AL. V. GEORGE HUSTON.**

38	293
47	860

FILED NOVEMBER 8, 1893. No. 5278.

1. **Malicious Prosecution: ACTION AGAINST JUSTICE, CONSTABLE, AND WITNESS: VENUE.** Section 54 of the Code of Civil Procedure provides: "Actions for the following causes must be brought in the county where the cause [of action], or some part thereof, arose: \* \* \* Second—An action against a public officer for an act done by him in virtue or under color of his office, or for neglect of his official duty." Accordingly, where, in a suit for malicious prosecution brought in Webster county against a prosecuting witness, justice of the peace, and constable, it appeared that the complaint was sworn out in Hitchcock county and filed there with the justice of the peace,

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who issued a warrant for plaintiff, and deputed the constable to execute it, and he arrested the plaintiff in Webster county, and took him before the justice in Hitchcock county, who examined and committed plaintiff to jail, *held*, (1) that plaintiff's cause of action was his alleged malicious prosecution by the defendants; (2) that, as the plaintiff was arrested in Webster county, a part of his cause of action arose there, and that the suit was rightly brought in that county; and (3) that the court had jurisdiction over the defendants summoned in Hitchcock county, although no defendant to the suit resided in, or was summoned in, Webster county. *McNee v. Sewell*, 14 Neb., 532, followed.

2. ———: ———: THE COMPLAINT AND WARRANT in the criminal prosecution, alleged to have been malicious, examined herein and *held* to state the substance of the charge, and to be sufficient when attacked collaterally.
3. ———: JUSTICES OF THE PEACE: LIABILITY FOR MALICE IN ISSUING WARRANT. A justice of the peace, in deciding upon the sufficiency of a complaint made before him, charging another with a crime, and in issuing a warrant of arrest for the party accused, acts judicially; and if he does so in good faith, with pure motives and without malice, he is not liable therefor if he had jurisdiction of the offense charged, and the complaint was not absolutely void.
4. ———: LIABILITY OF PROSECUTING WITNESS: ALLEGATIONS AND PROOF. To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives and was without probable cause. *Dreyfus v. Aul*, 29 Neb., 191, followed.

ERROR from the district court of Webster county. Tried below before BEALL, J.

The facts are stated in the opinion.

*W. S. Morlan*, for plaintiffs in error:

The district court of Webster county was without jurisdiction. The action cannot be maintained against N. T. Jones, justice of the peace, outside of Hitchcock county. (Code, sec. 54; *Clay v. Hoysradt*, 8 Kan., 80; *Graham v. Smith*, 62 Mich., 147; *Cobbey v. Wright*, 23 Neb., 250;

*Dunn v. Hazlett*, 4 O. St., 436; *Lamson Consolidated Store Service Co. v. Hart*, 5 N. Y. Supp., 889; *People v. Kingsley*, 8 Hun [N. Y.], 233; *Wintjen v. Verges*, 10 Hun [N. Y.], 576; *People v. Hayes*, 7 How. Pr. [N. Y.], 248; *Veeder v. Baker*, 83 N. Y., 156; *Dunn v. Haines*, 17 Neb., 563; *Cobbey v. Wright*, 29 Neb., 277; *Birmingham Iron Foundry v. Hatfield*, 43 N. Y., 227.)

The complaint filed with the justice was not void. He had jurisdiction. (Criminal Code, sec. 412; *Miller v. Woods*, 23 Neb., 200; Maxwell, Jus. Pr. [4th ed.], 806-808; *Hunt v. Hunt*, 72 N. Y., 217; *Austin v. Vrooman*, 28 N. E. Rep. [N. Y.], 478.)

For a mere error of judgment in the execution of his office no action can be maintained against a judge of any court. (*State v. Wolever*, 26 N. E. Rep. [Ind.], 765; *Gillett v. Thiebold*, 9 Kan., 427; *Yates v. Lansing*, 9 Johns. [N. Y.], 395; *Stone v. Graves*, 8 Mo., 148; *Lange v. Benedict*, 73 N. Y., 12; *Reid v. Hood*, 2 N. & Mc. [S. Car.], 168; *Brooks v. Mangan*, 49 N. W. Rep. [Mich.], 633; *Jennings v. Thompson*, 22 Atl. Rep. [N. J.], 1008; *Going v. Dinwiddie*, 25 Pac. Rep. [Cal.], 129.)

Judicial officers, acting within the limit of their jurisdiction, are not liable for their acts, though illegal or erroneous, unless they act from corrupt motives. (*Yates v. Lansing*, 5 Johns. [N. Y.], 282; *Hill v. Sellick*, 21 Barb. [N. Y.], 207; *Willis v. Havemeyer*, 5 Duer [N. Y.], 447; *Seaman v. Patten*, 2 Caines Rep. [N. Y.], 312; *Reed v. Conway*, 20 Mo., 22; *Morris v. Reynolds*, 2 Ld. Raym. [Eng.], 857; *Harman v. Brotherson*, 1 Den. [N. Y.], 537; *Kendall v. Stokes*, 3 How. [U. S.], 87; *Craig v. Burnett*, 32 Ala., 728; *Briggs v. Wardwell*, 10 Mass., 356; *Wall v. Trumbull*, 16 Mich., 228; *Hammond v. Howell*, 1 Mod. Rep. [Eng.], 184; *Kemp v. Neville*, 10 C. B. N. S. [Eng.], 523.)

So far as the evidence and pleadings are concerned, the defendant Vennum, under the advice of the county attor-

ney, went before the justice of the peace and filed his complaint in writing, and did no other act connected with said criminal prosecution. To be liable for false imprisonment he must do more than this. (*Steuer v. State*, 59 Wis., 472; *Grinham v. Willey*, 4 Hurl. & Nor. [Eng.], 496; *Beaty v. Perkins*, 6 Wend. [N. Y.], 382; *Barber v. Rollinson*, 1 Crompt. & Mees. [Eng.], 330; *Von Lotham v. Libby*, 38 Barb. [N. Y.], 345; *Carratt v. Morley*, 1 Q. B. [Eng.], 18; *Murphy v. Walters*, 34 Mich., 180; *West v. Smallwood*, 3 Mees. & Wels. [Eng.], 418.)

*J. M. Chaffin and George R. Chaney, contra:*

The district court of Webster county had jurisdiction of the parties defendant and the subject-matter of the action, under the allegations of the petition. The action is against three persons, jointly and severally, for a joint and several trespass committed upon the person of the defendant in error, and for which they are jointly and severally liable. (*Painter v. Ives*, 4 Neb., 122; *Comfort v. Fulton*, 39 Barb. [N. Y.], 56; *Judson v. Cook*, 11 Barb. [N. Y.], 644; *Forbes v. Hicks*, 27 Neb., 117.)

Jones was a public officer within the meaning of section 54 of the Code, and while he did no act outside of Hitchcock county in person, he put the machinery of the law in motion, so that the trespass was committed, through his instrumentality, in Webster county. But for this pretended warrant, with his official signature affixed thereto, no arrest would have been made. The statute does not contemplate that each one of several joint trespassers, nor the particular public officer through whose instrumentality a cause of action may arise, must appear in person and do some official act in each county where some part of the cause may arise. If by his official act a cause of action arise against him in more than one county, he may be sued in any one of the counties where any part of the cause arose, though he may not have appeared in person in that county to do

any official act. We therefore contend that the district court had jurisdiction over both Jones and Morton by reason of their respective official positions, and the several acts done by each, as set forth in the petition. (*McNee v. Sewell*, 14 Neb., 532; *Clay v. Hoysradt*, 80 Kan., 80; *Fay v. Edmiston*, 28 Kan., 108; *People v. Kingsley*, 8 Hun [N. Y.], 234; *Wintjen v. Verges*, 10 Hun [N. Y.], 576.)

The complaint was absolutely void. (*Smith v. State*, 21 Neb., 556; *Hauss v. Kohlar*, 25 Kan., 644; *Forbes v. Hicks*, 27 Neb., 116.)

The complaint and all proceedings under it were void, and the plaintiffs in error are liable. (*Prell v. McDonald*, 7 Kan., 454; *Bauer v. Clay*, 8 Kan., 583; *Hauss v. Kohlar*, 25 Kan., 644; *Forbes v. Hicks*, 27 Neb., 111.)

The justice acted ministerially in filing the complaint and issuing the warrant, and is liable to the party injured thereby. (*Rouss v. Wright*, 14 Neb., 458; *Wright v. Rouss*, 18 Neb., 234.)

It is urged that the justice had jurisdiction of this class of offenses, as examining magistrate, and, therefore, having jurisdiction of the subject of the criminal action, he is not liable for mistake of official and judicial judgment. His jurisdiction, however, is conferred by a complaint, a jurisdictional paper. Without the filing of a complaint, he could have no jurisdiction of this class of cases. (Criminal Code, sec. 280; *Comfort v. Fulton*, 39 Barb. [N. Y.], 56; *Miller v. Woods*, 23 Neb., 208; *Hauss v. Kohlar*, 25 Kan., 640.)

Neither can he acquire jurisdiction by deciding that he has it. In all such cases he decides at his peril. (Cooley, Torts, sec. 416; *Prosser v. Secur*, 5 Barb. [N. Y.], 607; *Noyes v. Butler*, 6 Barb. [N. Y.], 613.)

The statute prescribes the mode of acquiring jurisdiction, and such mode must be complied with or the proceeding is void. (Criminal Code, sec. 286; *People v. Board of Police*, 26 Barb. [N. Y.], 485; *McDermott v. Board of Police*, 25 Barb. [N. Y.], 635.)

RAGAN, C.

George Huston sued N. T. Jones, Columbus C. Vennum, and T. E. Morton in the district court of Webster county for false imprisonment and malicious prosecution, and in his petition alleged that on the 26th day of August, 1890, Jones was a justice of the peace of Hitchcock county; that Vennum and Morton were residents of said county, and that the plaintiff Huston was a resident of and in said Webster county; that on said day, Vennum, intending to harass, vex, and annoy plaintiff and scare him into giving security on a note, went before the said Jones, as such justice of the peace, and falsely, maliciously, and without any reasonable or probable cause, made a complaint in writing, under oath, in which he charged, or attempted to charge, the plaintiff Huston with the crime of having, in said county, in the year 1890, obtained possession of valuable papers by false pretenses and misrepresentations; that said complaint did not, as a matter of fact, charge plaintiff with any crime or offense known to the law; that thereupon said justice, acting in virtue of his office, issued what he termed and styled a "state warrant," in writing, for the arrest of the plaintiff, and delivered the same to the defendant Morton; that said pretended warrant did not charge said plaintiff Huston with the commission of any crime known to the laws of Nebraska, and was void on its face; that the said Jones, in his official capacity as justice of the peace, proceeded to deputize and appoint said Morton a special constable to serve said warrant, and that said justice had no lawful power or authority to make any such appointment, and that the same was void; that the said Morton accepted said pretended appointment, and with said warrant arrested plaintiff in Webster county and took him before said justice in Hitchcock county, who, acting in his official capacity, arraigned the plaintiff, and, after examination, bound him over to the district court; and plaintiff refusing to give bail,

the said justice committed him to jail, from which he was afterwards released by *habeas corpus* proceedings. There was no service upon, or appearance by, defendant Morton. Summons was issued from the district court of Webster county, and served upon Vennum and Jones in Hitchcock county, where they resided. There was a verdict and judgment against Vennum and Jones, and they bring the case here.

The first error alleged is that the court had no jurisdiction of the action or of the plaintiffs in error. This contention, so far as the justice of the peace Jones is concerned, is based on section 54 of the Code of Civil Procedure, which provides: "Actions for the following causes must be brought in the county where the cause [of action], or some part thereof, arose: \* \* \* Second—An action against a public officer for an act done by him in virtue or under color of his office, or for neglect of his official duty." The defendant Jones, being a justice of the peace, was a public officer. The acts done by him were the issuing of the warrant, the appointment of Morton to serve the same, and the examination and commitment of Huston to jail. These acts were all performed in Hitchcock county, and were done in virtue or under color of his office as justice of the peace. Jones contends that, therefore, this action cannot be maintained against him in Webster county, and that the court had no jurisdiction of the subject-matter of the action, or of him personally. What is Huston's cause of action? Evidently his alleged malicious prosecution and false imprisonment by the defendants. The complaint moved the justice to issue the warrant, and that produced the arrest, and this occurred in Webster county. A part, at least, of Huston's cause of action, then, arose in Webster county and a part in Hitchcock county, and the suit can be maintained in either county. The action was properly brought in Webster county, and the court had jurisdiction, both of the subject-matter of the action and of the defendant Jones. (*McNee v. Sewell*, 14 Neb., 532.)

The defendant Vennum's claim of the court's want of

jurisdiction over him is based on the fact that he was a resident of, and summoned in, Hitchcock county, and that no defendant to the action was a resident of, or summoned in, Webster county, and that therefore, by the provisions of section 60 of the Code of Civil Procedure, the district court of Webster county had no jurisdiction over him. But by section 65 of the Code of Civil Procedure it is provided: "Where the action is rightly brought in any county according to the provisions of title 4, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request." Now, this action was rightly brought in Webster county, and by the service of summons on the defendant in Hitchcock county, issued from Webster county, the court obtained jurisdiction over the defendant Vennum. It follows, then, that the court had jurisdiction over both the action and both the plaintiffs in error. (*Pearson v. Kansas Mfg. Co.*, 14 Neb., 211.)

The plaintiff in error Jones requested the court to give to the jury the following instruction: "The complaint, warrant, and mittimus, upon which the arrest of the plaintiff was made and imprisoned, are not void, and you must find for the defendant Jones, unless you find that he acted wantonly and maliciously in accepting said complaint and issuing a warrant for the arrest of the plaintiff; and also in holding him to bail and issuing a mittimus by which the plaintiff was confined in jail." This the court refused, and Jones now assigns such refusal as error.

The complaint and warrant were as follows:

"COMPLAINT.

"STATE OF NEBRASKA, }  
COUNTY OF HITCHCOCK. } ss.

Before N. T. Jones, Justice of the Peace in and for said  
County.

"STATE OF NEBRASKA }  
v. } For False Pretenses.  
GEORGE HUSTON. }

"Complaint and information of C. C. Vennum, of Hitch-

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cock county, aforesaid, made in the name of the state of Nebraska, before N. T. Jones, justice of the peace within and for said Stratton precinct, in said county, this 26th day of August, A. D. 1890, who, being duly sworn, on his oath says that George Huston, on the 22d day of August, A. D. 1890, in the county aforesaid, then and there being, did then and there violate section 125, chapter 15, of the statutes of the state of Nebraska, by false pretenses and misrepresentations obtained possession of valuable property, to-wit, one note of the value of \$110, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska.

“C. C. VENNUM.

“Subscribed in my presence and sworn to before me this 26th day of August, A. D. 1890.

“N. T. JONES,  
“*Justice of the Peace.*”

“WARRANT.

“STATE OF NEBRASKA, }  
HITCHCOCK COUNTY. } ss.

“*To the Sheriff or any Constable of said County:*

“T. E. Morton is hereby especially deputed to serve this writ.

“Whereas, C. C. Vennum has made complaint in writing and upon oath before me, one of the justices of the peace in and for said county, that George Huston, late of the county of Hitchcock, did, on or about the 22d day of August, 1890, in said county of Hitchcock, violate section 125, chapter 15, of the statutes of the state of Nebraska, by false pretenses and misrepresentation obtained possession of valuable papers, to-wit, one note of the value of \$110, and that George Huston has absconded from said county of Hitchcock to Webster county:

“You are therefore commanded to pursue and arrest the said George Huston, if found in this state, and him convey before me, or any magistrate having cognizance of

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the case in said Hitchcock county, there to be dealt with according to law.

"Given under my hand this 26th day of August, A. D. 1890. N. T. JONES, J. P."

The complaint and warrant were informal and defective, but they were not absolutely void. They stated the substance of the criminal charge, and that is sufficient where they are attacked collaterally as they are here. (*Miller v. Woods*, 23 Neb., 200.)

The learned judge below tried the case on the theory that the action was one of false imprisonment, and so it would have been had the complaint and warrant been absolutely void, but as they were not, the facts made the case, if anything, an action for malicious prosecution. (*Wagstaff v. Schippel*, 27 Kan., 450.)

The justice of the peace, in acting upon the complaint and in issuing the warrant, acted judicially, and if he did so in good faith, with pure motives and without malice, he is not liable therefor. (*Gillett v. Thiebold*, 9 Kan., 427; *Dreyfus v. Aul*, 29 Neb., 191.)

The refusal of the court to give the instruction asked was error.

The court also instructed the jury as follows:

"You are instructed that the complaint before you, filed and sworn to before Jones, by Vennum, on the 26th day of August, 1890, and the warrant issued by said Jones for the arrest of Huston are void upon their face, and charge no criminal offense against said Huston.

"If you find from the evidence that the plaintiff was unlawfully restrained of his liberty by the unlawful acts of the defendants, you shall find for the plaintiff and assess his damages at such amount as you, in your judgment, deem fair and reasonable from the evidence before you."

To the giving of each of these instructions the defendant Vennum duly excepted, and now assigns the ruling of the court in giving them as error. By the first instruction

the court told the jury that the complaint sworn out by Vennum was void; and by the second, that if they found that Huston had been restrained of his liberty by the unlawful acts of the defendants, they should find for the plaintiff. The court had already, in other instructions, told the jury that the action was for malicious prosecution and false imprisonment, and that to constitute false imprisonment two things were necessary, viz., the detention of the person, and the unlawfulness of such detention. As already observed, the complaint, though defective, was not void; and for swearing it out, plaintiff's action against Vennum, if anything, is an action for malicious prosecution. These instructions, taken together, left the jury free to conclude that the swearing out of the complaint by Vennum was of itself an unlawful act. To render Vennum liable to plaintiff for swearing out the complaint it must appear that Vennum's conduct in the premises was inspired by malicious motives and was without probable cause. The instructions complained of, when taken in connection with the others quoted above, took from the jury all inquiry as to Vennum's motives in making the complaint, and were erroneous.

Plaintiffs in error took exceptions on the trial to the admission in evidence of an alleged telegram received by the plaintiff. Its admission was error as no foundation was laid for it as evidence. It was not the best evidence. The original telegram sent was not produced or its absence accounted for, nor was the writing put in evidence shown to be identical with the one sent. We cannot review the court's rulings, however, because not specifically assigned as an error in the petition in error filed in this court.

On the trial plaintiff offered to prove certain statements made to him by the officer having him under arrest. These were excluded. What Morton said to plaintiff while he had him under arrest concerning the same, or the causes therefor, and what Morton did, were competent evidence. They were part of the things done.

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Belknap v. Stewart.

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The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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I. J. BELKNAP V. ASA STEWART.

FILED NOVEMBER 8, 1893. No. 4970.

1. **Husband and Wife: LIABILITY OF HUSBAND TO THIRD PERSON FOR WIFE'S BOARD AND LODGING: EVIDENCE.** The findings and judgment of a court granting a wife a decree of divorce from her husband on the grounds of extreme cruelty are not competent evidence to prove that she was justified in leaving her husband's home and living apart from him, in an action brought by a third person against the husband for boarding and lodging the wife.
2. ———: ———: ———. In the absence of a special promise of the husband to pay for the board and lodging of his wife, living apart from him, he will not be responsible therefor, unless she lived separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board. *Schnuckle v. Bierman*, 89 Ill., 454, approved.

ERROR from the district court of Lancaster county.  
Tried below before TIBBETS, J.

The facts are stated in the opinion.

*Pound & Burr*, for plaintiff in error:

The findings and decree in the divorce suit were conclusive evidence of cruelty of the husband, and competent evidence that the wife had just cause to leave her husband's house and board and lodge with plaintiff. The divorce suit was a proceeding *in rem*, and the findings and decree therein are binding and conclusive upon strangers and third persons as well as upon parties to the suit. (1 Greenleaf, Evidence, secs. 525, 543; Freeman, Judgments, sec.

610; 2 Smith's Leading Cases, 670; 2 Bishop, Marriage, Divorce, and Separation, secs. 20, 23, 27; 2 Black, Judgments, secs. 612, 795, 803, 822, 925; *Burlen v. Shannon*, 3 Gray [Mass.], 387, 389; *Ennis v. Smith*, 14 How. [U. S.], 400, 430; *In re Newman*, 75 Cal., 213; *Gould v. Crow*, 57 Mo., 200; *Monroe v. Douglas*, 4 Sandf. Ch. [N. Y.], 134; *Grant v. M'Lachlin*, 4 Johns. [N. Y.], 34; *State v. Central P. R. Co.*, 10 Nev., 80; *Barrow v. West*, 23 Pick. [Mass.], 270; *McCarthy v. Marsh*, 5 N. Y., 263; *Pennoyer v. Neff*, 95 U. S., 734; *Gelston v. Hoyt*, 16 U. S., 277; *Sturtevant v. Randall*, 53 Me., 149; *Blad v. Bamfield*, 3 Swanst. [Eng.], 604; *Tarleton v. Tarleton*, 4 M. & S. [Eng.], 20; *Robinson v. Jones*, 8 Mass., 536; *Vandenhoevel v. United Ins. Co.*, 2 Caine's Cases [N. Y.], 217.)

A sentence of a matrimonial court is binding as a judgment *in rem*, and as such conclusive upon all persons in all countries. (Freeman, Judgments, sec. 610; 2 Smith's Leading Cases, 670; 2 Black, Judgments, sec. 926.)

Pending divorce suit the husband is liable, the same as though it were not in progress, to any third person who may supply the wife with necessities, he not having provided them himself. (2 Bishop, Marriage, Divorce, and Separation, sec., 961; *Keegan v. Smith*, 5 B. & C. [Eng.], 375; *Sykes v. Halstead*, 1 Sandf. [N. Y.], 483; *Dowe v. Smith*, 11 Allen [Mass.], 107; *Johnston v. Allen*, 39 How. Pr. [N. Y.], 506.)

*Sawyer & Snell, contra:*

The decree in the divorce suit was not admissible, because it was not between the same parties. In that case it was the wife against the husband. In the present, it is a person who furnished the wife with necessities, against the husband. Both parties must be bound by a judgment or neither. The operation must be mutual. (*Burlen v. Shannon*, 3 Gray [Mass.], 387; *Bigelow v. Windsor*, 1 Gray [Mass.], 299; *Helphrey v. Redick*, 21 Neb., 83.)

RAGAN, C.

Belknap sued Stewart in the district court of Lancaster county, alleging in his petition "That on the 17th day of September, 1889, Anna R. Stewart, wife of the defendant, commenced boarding and lodging at plaintiff's house, and continued to board and lodge with plaintiff until the 31st day of December 1889; that said defendant caused the said Anna R. Stewart, his wife, to leave the home of the defendant, and that she was obliged to leave said defendant's home on or about said 17th day of September; that the defendant agreed to pay for said board and lodging what the same was reasonably worth, and that said board and lodging were reasonably worth the sum of \$4.50 per week. No part of the same had been paid, and there was due the plaintiff from the defendant the sum of \$——." Stewart's answer to this petition, so far as we notice it, was (1) a general denial of all the allegations of the petition; (2) that at all the times mentioned in plaintiff's petition he was the owner of, and in possession of, a comfortable home in the city of Lincoln, which he had provided with suitable provisions and board, all of which were free to the said Anna R. Stewart; and that if she procured board of the plaintiff, she did it without the consent of the defendant, and wholly upon her own responsibility. Stewart had a verdict and judgment, and Belknap brings the case here.

From the record before us it appears that on the 22d of September, 1889, Stewart's wife left his home and began boarding and lodging with Belknap, and so continued until December 31, 1889. Two days after Stewart's wife left him she began a suit against him for divorce on the grounds of extreme cruelty, and some time afterwards obtained a decree of divorce on those grounds. On the trial of this case the pleadings, findings, decree, and all the other proceedings in the divorce case were, without objection,

read in evidence to the jury by Belknap's counsel. When the court came to charge the jury he excluded from their consideration all these pleadings and proceedings in the divorce suit. This action of the court is one of the errors assigned here by Belknap. The court was entirely right in so excluding them from the jury's consideration. They should not have been admitted in the first place. The object of using these divorce proceedings and decree as evidence in this case was to establish, conclusively, the fact that Mrs. Stewart, by reason of her husband's extreme cruelty towards her, had just cause for leaving his home, and that she therefore carried her husband's credit with her. But were the divorce proceedings and decree competent evidence in the case at bar for such purpose? We think not.

*Burlen v. Shannon*, 3 Gray [Mass.], 388, was a suit by a third party against the husband for necessities furnished the wife. The court said: "The decree of divorce was not competent evidence, because it was not between the same parties. In that case it was the wife against the husband; in the present, it is a person who has furnished the wife with necessities and he sues the husband. It has been argued that a direct adjudication of a court having a peculiar jurisdiction on the subject of marriage and divorce, like a decree in a process *in rem*, is conclusive and binding upon all persons having to establish or contest the conclusions of fact determined by it. We have no doubt that this court has a peculiar jurisdiction on the subject of marriage and divorce, and that a decree upon a libel for divorce directly determining the status of the parties, that is, whether two persons are or are not husband and wife; or, if they have been husband and wife, that such a decree divorcing them, *a vinculo* or *a mensa*, would be conclusive of the fact, in all courts and everywhere, that they are so divorced. If it were alleged that a marriage were absolutely void as being within the degrees of consanguinity, a decree of this court, on a libel by

one of the parties against the other, adjudging the marriage to be void or valid, would be conclusive everywhere. \* \* The legal social relation and condition of the parties as being husband and wife or otherwise, divorced or otherwise, is what we understand by the term 'status.' To this extent the decree in question had its full effect by which every party is bound. \* \* \* Beyond this legal effect in a judgment in a case of divorce,—that of determining the status of the parties,—the law applies as in other judicial proceedings, that a judgment is not evidence in another suit, except in a case in which the same parties or their privies are litigating in regard to the same subject of controversy.

“But it is contended that there was a privity between the party suing for necessities furnished the wife and the wife herself, so as to make the judgment in a former suit by the wife against the husband evidence in plaintiff's suit against him. But the case is not within any of the definitions of privity, either in law or in fact, known and recognized by the rules of the law. In regard to the rights sued for in this action, this plaintiff does not claim the same right or interest which the wife could claim as privy in contract or in blood, or in estate. The relation of the wife was much more nearly that of an agent having an authority to bind the defendant by a contract. \* \* \* No judgment in a suit between such agent and the defendant can be evidence. One test to decide whether a judgment is admissible as between privies is to inquire whether it would be mutual. Both of the litigants must be alike concluded or the proceedings cannot be set up as conclusive upon either.

“This rule, that a judgment must be between the same parties or their privies, is to be construed strictly to mean parties claiming under the same title. The present plaintiff could not in any form have appeared in the suit for divorce or taken any part in the trial, or put any question to

a witness, or appealed from the judgment. \* \* \* A judgment or judicial determination is conclusive even between the parties as evidence only of what is directly put in issue and tried, not of the collateral and incidental facts which are involved in the discussion, but not embraced in the decree.

“The decree in question does not directly bear upon the fact whether the wife was justified in absenting herself from her husband’s house, or whether in fact she did absent herself. \* \* \* She may have suffered extreme cruelty, and yet not absented herself from her husband’s house; and so, *vice versa*, she may have been placed in such a condition of suffering or danger as would render it justifiable to leave her husband’s house without having suffered extreme cruelty.”

This case is directly in point here, and we approve both of the reasoning and the conclusion thereof. It follows that the court did not err in taking the divorce proceedings from the consideration of the jury.

Another error alleged here by Belknap is the refusal of the court to give to the jury the following instruction: “The jury are instructed that if they find from the evidence that said defendant Asa Stewart and his wife, Anna Stewart, had due and regular trial in the action for a divorce in this court before the Honorable Allen W. Field, and that in that action the said court made findings of fact as follows: ‘Finds that the plaintiff and defendant were duly married at the city of Keokuk, state of Iowa, on the 7th day of November, 1865, as set forth in said petition, and that ever since said marriage plaintiff has conducted herself towards the defendant as a faithful, chaste, and obedient wife; finds that the defendant has been guilty of extreme cruelty towards the plaintiff as in her petition alleged, and all without just cause or provocation,’ then you are instructed that said defendant Asa Stewart is bound and concluded by such findings of the court in said action for a divorce.”

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What has already been said disposes of this assignment. Had the court permitted the divorce proceedings to remain before the jury, it would have been error to give this instruction.

Another error alleged is: "On the trial of this case, the rules of evidence seem to have been entirely disregarded, as leading questions were allowed to be asked Stewart as a witness." The record discloses that Stewart was afflicted with paralysis, and in order to elicit anything from him it seems to have been necessary to so frame questions that he could answer in monosyllables. The court did not err in permitting leading questions to be propounded to this witness. There were two issues in this case: (1) Did Mrs. Stewart have such cause for leaving her husband's home as to render him liable for her support by Belknap? (2) Did Belknap furnish Mrs. Stewart board and lodging on her own credit or on the credit of her husband? There is evidence in the record to support the finding of the jury in Stewart's favor on both these issues. The correct rule undoubtedly in such cases as the one at bar is, in the absence of any special promise of the husband to pay for the board and lodging of his wife living apart from him, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board. (*Schnuckle v. Bierman*, 89 Ill., 454.) There is no evidence in the record that Stewart ever promised to pay his wife's board and lodging, nor is there any evidence that she lived apart from him by his consent.

There is no error in the record and the judgment of the district court is

**AFFIRMED.**

## CHARLES F. BARRAS ET AL. V. POMEROY COAL COMPANY.

FILED NOVEMBER 8, 1893. No. 4928.

**Statute of Frauds:** ORIGINAL PROMISE TO PAY FOR GOODS DELIVERED TO A THIRD PERSON. B. & C. had a contract for the construction of a school building, and sublet a part of the work to one J. B. & C. and the P. C. Company then entered into a verbal agreement, by the terms of which the P. C. Company was to furnish J. such material as he might need in said work, present the bills therefor to J., for his O. K., and thereupon B. & C. were to pay them. *Held*, An original promise on the part of B. & C., and not a promise to pay J.'s debt. *Waters v. Shafer*, 25 Neb., 225, and *Lindsey v. Heaton*, 27 Neb., 662, followed.

ERROR from the district court of Lancaster county.  
Tried below before TIBBETS, J.

The facts are stated in the opinion.

*Atkinson & Doty*, for plaintiffs in error:

A promise by Chidester & Barras to pay orders given by Mr. Johnson in favor of Pomeroy Coal Company would not take the case out of the statute of frauds; and if made as stated by plaintiff, would only be collateral. (*Manley v. Geagan*, 105 Mass., 445; *Preston v. Young*, 46 Mich., 103; *Foster v. Napier*, 74 Ala., 393; *Wills v. Ross*, 77 Ind., 1; *Langdon v. Richardson*, 58 Ia., 610; *Welch v. Marvin*, 36 Mich., 59; *Cole v. Hutchinson*, 34 Minn., 410; *Vaughn v. Smith*, 22 N. W. Rep. [Ia.], 684.)

So long as the original debt remains payable by the debtor to his creditor, any agreement by which any other party promises to pay the debt is within the very letter of the statute. (*Hooker v. Russell*, 67 Wis., 257; *Clapp v. Webb*, 52 Wis., 638; *Lantz v. Pearce*, 101 Ind., 595; *Langdon v. Richardson*, 58 Ia., 610.)

If the original liability remains and the promise of Chidester & Barras was made as that of sureties, it would be a collateral agreement, whatever the intent of the party at the time of making it. (*Mitchell v. Griffin*, 58 Ind., 559; *Palmer v. Blain*, 55 Ind., 11; *Gill v. Herrick*, 111 Mass., 501.)

*Talbot & Bryan, contra:*

The evidence is conclusive that no debt or obligation had been created previous to the promise of Chidester & Barras; and therefore the promise of Chidester & Barras was not a collateral, but an original undertaking. (*Lindsey v. Heaton*, 27 Neb., 668; *Waters v. Shafer*, 25 Neb., 225.)

RAGAN, C.

The Pomeroy Coal Company sued Charles F. Barras and William J. Chidester in the district court of Lancaster county, and in their petition alleged: "The plaintiff complains of the defendants and for cause of action alleges that the defendants are indebted to the plaintiff in the sum of \$161.77 on account of goods and material sold and delivered by plaintiff to the defendants at their special instance and request."

Barras & Chidester answered as follows: "The said defendants, in answer to the petition of the plaintiff, say that at the time the plaintiff alleges that it sold the certain goods and material to the defendants, the defendants were acting and doing business together as contractors and builders under the firm name of Barras & Chidester. Said defendants deny each and every allegation contained in said petition."

There was a verdict and judgment for the coal company, and Barras & Chidester bring the case here.

It appears from the record that Barras & Chidester were partners and had a contract for building a school house in

the city of Lincoln, and that one Johnson had subcontracted the work from Barras & Chidester. The coal company's evidence was positive to the effect that it refused to credit Johnson, and made an agreement with Barras & Chidester by which the coal company was to furnish Johnson such material as he wished for use in the construction of said school house; have him O. K. the bills, and they, Barras & Chidester, would pay them; that the coal company gave the credit to Barras & Chidester, made out bills from time to time against Johnson for materials furnished, presented them to him, he O. K.'d them, and thereupon Barras & Chidester paid them. The bill sued for here was so presented and O. K.'d, but payment refused. On the other hand, Barras, the only witness for Barras & Chidester, positively denied the making of the contract with the coal company to pay for materials used by Johnson in the building. Barras admitted paying bills to the coal company O. K.'d by Johnson, but claims he did so because Barras & Chidester at the dates of such payments were indebted to Johnson. Barras & Chidester assign here six errors :

First—"The court erred in permitting the coal company to put in evidence on the trial the bills for material made out against Johnson." The bills put in evidence and objected to were the statements for the material sued for in this action, and only so much of them was offered as referred to the O. K. of Johnson, and his order on Barras & Chidester to pay. The objection of counsel for Barras & Chidester was: "Objected to because, in the first place, it assumes that we agreed to pay them, and one of our principal defenses is that we did not agree to pay them; and if there is any agreement to assume the obligations of another, it must be in writing." The coal company's evidence was that it sold the material to Barras & Chidester and was to furnish it to Johnson, procure his O. K. of the bill, and then Barras & Chidester were to pay it. That part of the

statements showing Johnson's O. K. was competent evidence and properly admitted. The fact that the statements show on their face that they were made out against Johnson, was a circumstance in no way prejudicial to Barras & Chidester.

Second—"The court erred in overruling defendant's objection to any testimony being received touching the agreement of Barras & Chidester to pay for material to be furnished James Johnson because the agreement so to do was not in writing." The evidence of the coal company, and all its evidence, was to the effect that Barras & Chidester's promise was not to pay a debt of Johnson's then in existence, nor yet one he might thereafter contract; but whatever material Johnson procured from the coal company for use in the school house, Barras & Chidester were to pay for. The only thing Johnson had to do with it was to certify to the correctness of the amount of material and its price. This evidence did not show, or tend to show, the promise on the part of Barras & Chidester to pay Johnson's debt, but their own. (*Waters v. Shafer*, 25 Neb., 225; *Lindsey v. Heaton*, 27 Neb., 662.)

Third—"The court erred in overruling the defendant's offer to put in evidence a contract between James Johnson and Barras & Chidester, in which the said Johnson agrees to furnish all the brick, mortar, and sand for a certain building known as the 'Cherry Street School Building.'" The record discloses the following reason of counsel for offering to put in evidence this contract: "The defendants offer the contract between James Johnson and Barras & Chidester in evidence to show that the plaintiff, knowing there was a written contract between Johnson and Barras & Chidester, had no legal right, under the terms of said contract, to charge the firm of Barras & Chidester with material furnished Johnson to be used on the school house." This contract did not tend to prove Barras & Chidester's case; nor did it tend to refute the coal com-

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pany's case. It was immaterial as evidence and properly excluded.

Fourth—This is the same as the third.

Fifth—"The court erred in admitting that part of Mr. Lemist's evidence as to what Mr. Barras said in regard to paying for material furnished Johnson." After repeated readings of the bill of exceptions, we have been unable to find any objections made at the trial to Lemist's evidence as to what Barras told him.

Sixth—"The verdict is not sustained by the evidence." We cannot better express our own opinion of the merits of this assignment of error than to quote an instruction given to the jury by the learned judge who presided at the trial. It is as follows: "The testimony on behalf of the defendants supports the defendants' theory of the case, and the testimony on behalf of the plaintiff supports the plaintiff's theory of the case; and it reduces itself, so far as you are concerned, to decide upon the reliability of the testimony of each of the parties."

There is no error in the record. The judgment of the district court is

**AFFIRMED.**

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**HENRY KAHRE, APPELLEE, v. N. C. RUNDLE, IM-  
PLEADED WITH FRANK N. PROUT, APPELLANT.**

FILED NOVEMBER 8, 1893. No. 4994.

1. **Vendor and Vendee: POSSESSION NOTICE OF TITLE.** Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor.
2. ———: ———: **FRAUD: RESCISSION.** This rule holds good in favor of a vendor who remains in possession after his conveyance, claiming that the conveyance was procured by fraud, as against a purchaser from the fraudulent vendee, where such purchaser knew of the vendor's possession and made no inquiry respecting it.

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APPEAL from the district court of Douglas county.  
Heard below before DOANE, J.

The facts are stated in the opinion.

*Frank T. Ransom and Rickards & Prout*, for appellant:

Here was a person who, having owned property, had by his own act transferred it to another, and executed a deed therefor. Is he not estopped from relying on his possession as evidence to subsequent purchasers that he claims title to the premises? A large and respectable line of authorities answers this question in the affirmative. (Wade, Notice, sec. 299; *Scott v. Gallagher*, 14 S. & R. [Pa.], 333; *Newhall v. Pierce*, 5 Pick. [Mass.], 450; *New York Life Ins. Co. v. Cutler*, 3 Sandf. Ch. [N. Y.], 193; *Van Keuren v. Central R. Co.*, 38 N. J. Law, 165; *Hafter v. Strange*, 3 So. Rep. [Miss.], 190; *Bloomer v. Henderson*, 8 Mich., 395.)

*Prima facie*, the possession is of itself sufficient notice, whether it is actually known or not; but this presumption from possession, like that arising from any other fact putting one upon inquiry, is subject to rebuttal by proof showing that an inquiry, duly and seasonably made, failed to disclose any legal or equitable title in the occupant. (*Betts v. Letcher*, 46 N. W. Rep. [So. Dak.], 193; *Riley v. Quigley*, 50 Ill., 304.)

*John T. Cathers, contra:*

Possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor. (*Uhl v. May*, 5 Neb., 157; *Jones v. Johnson Harvester Co.*, 8 Neb., 446; *Dunn v. Remington*, 9 Neb., 84; *McHugh v. Smiley*, 17 Neb., 620; *Buck v. Holloway's Devisees*, 2 J. J. Marshall [Ky.], 164; *Tuttle v. Jackson*, 6 Wend. [N. Y.], 225; *Colby v. Kenniston*, 4 N. H., 265; *Gouverneur v. Lynch*, 2 Paige Ch. [N. Y.],

300; *Parks v. Jackson*, 11 Wend. [N. Y.], 443; *Pell v. McElroy*, 36 Cal., 268; *Franz v. Orton*, 75 Ill., 100; *Wickes v. Lake*, 25 Wis., 71; *D'Wolf v. Pratt*, 42 Ill., 210; *Warren v. Richmond*, 53 Ill., 52; *Haughwout v. Murphy*, 32 N. J. Eq., 548; *Youngs v. Wilson*, 27 N. Y., 354; *Taylor v. Stibbert*, 2 Ves. Jr. [Eng.], 437\*.)

One who purchases land in the actual possession of a third party will be held charged with notice of the latter's equities. (*Harper v. Perry*, 28 Ia., 57; *McKinzie v. Perrill*, 15 O. St., 162; *Krider v. Lafferty*, 1 Whart. [Pa.], 318; *Randall v. Silverthorn*, 4 Pa. St., 173; *Hood v. Fahnestock*, 1 Pa. St., 470; *Lewis v. Bradford*, 10 Watts [Pa.], 79; *Heckerman v. Hummell*, 7 Harris [Pa. St.], 70; *Lipp v. South Omaha Land Syndicate*, 24 Neb., 692; *Hatch v. Bigelow*, 39 Ill., 546; *Killey v. Wilson*, 33 Cal., 690; *Tate v. Hilbert*, 2 Ves. [Eng.], 120; *Daniels v. Davison*, 17 Ves. [Eng.], 433\*.)

#### IRVINE, C.

Henry Kahre brought this action in the district court of Douglas county originally against N. C. Rundle alone, alleging that in January, 1890, Kahre was the owner of lot five in block four in Dupont Place, in the city of Omaha, and that defendant Rundle was the owner of certain land in Chase county; that the parties entered into an agreement to exchange said property, and that deeds in consummation of such exchange were executed and delivered. He further alleged that he was induced to enter into said trade because of false representations, unnecessary to here set out at length, in regard to the character of the Chase county land, and prayed for a rescission of the contract, and that the deed executed by him be set aside. An answer was filed by Rundle denying all allegations in regard to the false representations and alleging an unconditional exchange in good faith. The answer further pleaded that on the 19th day of March, 1890, Rundle had sold and conveyed said

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lot to Frank N. Prout, and that Prout had paid a valuable consideration, and was without notice of any dissatisfaction on the part of the plaintiff. Thereafter Prout was allowed to intervene in the case. He alleged that the deed was made by Rundle to him, but that he took the title in trust for himself and his partner, Rickards, and that they were purchasers for value and without notice. A decree was rendered in favor of plaintiff. Prout appeals.

There is practically no question raised as to the sufficiency of the evidence or the propriety of the finding that the conveyance from Kahre to Rundle was procured by fraud, but the intervenor Prout insists that the finding that Prout was not a *bona fide* purchaser for value without notice was erroneous and unsupported by the evidence. The petition in the case of *Kahre v. Rundle* was filed March 3, 1890, which was prior to the conveyance to Prout, but the transcript of the record shows no service of process upon Rundle and no answer filed by him until June 26, 1890. No notice of *lis pendens* was filed. There is therefore no evidence in the record of constructive notice to Prout at the time he took the conveyance. (Code of Civil Procedure, sec. 85.) Nor is there any evidence of actual notice save such as may be derived from Kahre's continued occupancy of the property after his conveyance to Rundle. Upon this point the evidence tends to show that Kahre and his brother remained in possession of the Dupont Place property; that before the trade between Rundle and Prout was consummated Prout came to Omaha and examined the records, and finding title of record in Kahre placed upon record the deed from Kahre to Rundle, which Rundle had given him for that purpose; that he went to the property and inquired for Kahre, from which it would appear that he already knew of Kahre's possession. He made inquiry of Kahre's brother, left his business card with him with the request that he should tell Kahre of the call and have him write to Rickards & Prout in relation to rent; that

Prout then returned to Beatrice, where he lived, and next day completed the trade with Rundle. It quite clearly appears that Rickards & Prout were purchasers for a valuable consideration, and that at the time they took the conveyance from Rundle they knew nothing about the false representations relied upon by Kahre to defeat their title.

It is settled by a considerable line of authority that upon general principles possession of land is notice to all the world, not only of the possession itself, but of the right, title, and interest of the possessor. (*Uhl v. May*, 5 Neb., 157; *Weaver v. Coumbe*, 15 Neb., 167; *McHugh v. Smiley*, 17 Neb., 620; *Scharman v. Scharman*, 38 Neb., 39.) These cases were not, however, cases where the vendor remained in possession after a recent conveyance; and it is contended that in such case the continued possession of the vendor, especially for a short time, is not notice to a purchaser from the vendee of a continued interest or claim of the vendor contrary to his act of conveyance. Upon this question of law the whole case turns. We are cited to a number of cases upon the subject. In some states it is distinctly held that the rule charging a purchaser with notice of the occupant's title from the fact of occupancy does not apply where the occupant has been divested of title by his own deed. (*Bloomer v. Henderson*, 8 Mich., 395; *Van Keuren v. Central R. Co.*, 38 N. J. Law, 165; *Newhall v. Pierce*, 5 Pick. [Mass.], 450; *Scott v. Gallagher*, 14 S. & R. [Pa.], 333.) Elsewhere, however, such a distinction is denied. (*Hopkins v. Garrard*, 7 B. Mon. [Ky.], 312; *Pell v. McElroy*, 36 Cal., 268; *Illinois C. R. Co. v. McCullough*, 59 Ill., 166; *Berryhill v. Kirchner*, 96 Pa. St., 489.) In none of the cases cited on behalf of appellant is there any good reason urged for the distinction claimed, and an exception should not be made to the general rule in the absence of a sound reason therefor. Cases may arise presenting a state of facts grounding

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reasons for a departure from the general rule, but we perceive nothing in this case warranting such a departure.

In *Uhl v. May*, 5 Neb., 157, and in *McHugh v. Smiley*, 17 Neb., 620, the general rule was laid down as applicable to this state. In both cases the distinction here contended for might have been drawn, but was not; and in *Hansen v. Berthelsen*, 19 Neb., 433, the point seems to have been urged upon the court, and it was there said: "Some doubt has been expressed as to the application of the rule as to notice where a grantor continues to hold possession after the delivery of his deed, but in our view there is no reason for a distinction. The question in both cases is, by what right is he in possession?"

We think, therefore, that Kahre's possession, a fact known to Prout before he took the conveyance, put Prout upon inquiry as to Kahre's continued claim to the premises. It is not shown that he made such inquiry, but, on the contrary, seems to have assumed that Kahre remained in possession as the tenant of Rundle. The judgment of the district court must be

AFFIRMED.

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JOHN P. WAGNER ET AL. V. NORVEL LEWIS.

FILED NOVEMBER 21, 1893. No. 5285.

**Vendor and Vendee: FRAUD AND MISREPRESENTATIONS: RESCISSION OF CONTRACT: EQUITY.** One L. sold his farm for \$4,000 in notes of third persons, the purchaser to assume an incumbrance on the farm for about \$2,500. The plaintiff charged that the purchaser of the farm had made representations that the notes were good and that he relied upon the same, which representations were untrue. The notes proving to be nearly worthless, the vendor of the farm tendered them back and asked for a rescission, and that the title of the farm be reconveyed and quieted in him. The court below having found in his favor, *held*, that the judgment was right, and is affirmed.

ERROR from the district court of Gage county. Tried below before BROADY, J.

The opinion contains a statement of the case.

*Griggs, Rinaker & Bibb*, for plaintiffs in error:

Fraud is never presumed, but must be proved by the party asserting it, by a fair preponderance of evidence (*Miller v. Finn*, 1 Neb., 288; *Clark v. Tennant*, 5 Neb., 557; *Missouri Valley Land Co. v. Bushnell*, 11 Neb., 197; *Clemens v. Brillhart*, 17 Neb., 337; *Western Ins. Co. v. Putnam*, 20 Neb., 334), and the degree of proof necessary to establish it is the same in equity as in law. (*Tootle v. Dunn*, 6 Neb., 93; *Ford v. Chambers*, 19 Cal., 143; *McConihe v. Sawyer*, 12 N. H., 399; *Watkins v. Wallace*, 19 Mich., 57.)

The presumption of law is that the business transactions of every man are done in good faith, and for an honest purpose, and any one who alleges that such acts are done in bad faith or for a dishonest purpose, takes upon himself the burden of showing, by specific acts and circumstances tending to show fraud, that such acts were done in bad faith. (*Ahlman v. Meyer*, 19 Neb., 66.)

While the law abhors fraud, it is also unwilling to impute it on slight and trivial evidence, and thereby cast an unjust reproach upon the character of parties. (*Blow v. Gage*, 44 Ill., 208.)

Such an imputation is grave in its character, and can only be sustained on satisfactory proof. If the evidence is so conflicting that no conclusion can be reached, the transaction must be sustained upon the principle that the burden of proof is upon the party who assails it; and if he does not more than create an equilibrium, he fails to make out his case. (*Kaine v. Weigley*, 22 Pa. St., 179; *Bodine v. Simmons*, 38 Mich., 682.)

Mere suspicion leading to no certain results is not suf-

ficient. A legal title will not be divested upon mere conjectures, or evidence loose and indeterminate in its character. (*Waterman v. Donalson*, 43 Ill., 29; *Darling v. Hurst*, 39 Mich., 765.)

As an allegation of fraud is against the presumption of honesty, it requires stronger proof than if no such presumption existed. (*White v. Bettis*, 9 Heisk. [Tenn.], 645.)

The character of a transaction is not dependent on the peculiar notions of the judge as to what will constitute good or ill faith. (Bump, *Fraud. Con.*, ch. 23; *Wilson v. Lott*, 5 Fla., 305; *Hempstead v. Johnston*, 18 Ark., 123.)

*F. B. Sheldon and Hardy & Wasson, contra:*

In cases tried to the court without a jury a finding on questions of fact is entitled to the same respect in the supreme court as would be accorded to the verdict of a jury under like circumstances. (*Cheney v. Eberhardt*, 8 Neb., 423; *McLaughlin v. Sandusky*, 17 Neb., 112.)

Such unconscionableness and inadequacy in bargain as shock conscience may in equity amount to decisive evidence of fraud. (*Burch v. Smith*, 15 Tex., 219; *Rea v. Missouri*, 17 Wall. [U. S.], 532; *Farmer v. Calvert*, 44 Ind., 209; *Densmore v. Tomer*, 11 Neb., 118.)

Parties about to perpetrate fraud are usually very careful to provide that there shall not be any positive evidence of its commission, and evidence of fraud is not required to be direct and positive, but may be, and in most cases is, proved by circumstantial or presumptive evidence. (*McDaniel v. Baca*, 2 Cal., 326; *Greer v. Caldwell*, 14 Ga., 207; *Strauss v. Kranert*, 56 Ill., 254; *Juzan v. Toulmin*, 9 Ala., 662; *Thomas v. Rembert*, 63 Ala., 561; *Billings v. Billings*, 2 Cal., 107; *Faulkner v. Klamp*, 16 Neb., 175.)

MAXWELL, C. J.

This petition is in equity and sets forth that on March 2, 1891, the plaintiff below was the owner of the southeast quar-

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ter of section 32, township 4, range 7, in Gage county, Nebraska, of the value of \$6,000; that said land was incumbered in the sum of about \$2,500; that on or about March 1, 1891, the defendant John P. Wagner offered to purchase said land from plaintiff, and in payment therefor to assume the incumbrance, except the accrued interest to March 1, 1891, and to give the plaintiff in addition the sum of \$4,000 in good notes, which he represented that he then had and owned, which offer the plaintiff then and there accepted; that on or about the 2d day of March, 1891, the defendant John P. Wagner gave plaintiff a large number of notes, ranging in amounts from \$10 to \$444.48; that the said John P. Wagner represented to plaintiff that said notes amounted to more than \$4,000, and that all were good and collectible, and plaintiff, relying on said representations, and knowing nothing of the value of said notes other than the representations of the defendant, took said notes and executed and delivered to said Wagner a deed of the premises, subject to the said incumbrance; that after Wagner had selected said notes and made the representations concerning them, he fraudulently, and without the knowledge and consent of plaintiff, removed a number of said notes and inserted in their place other notes of no value whatever; that plaintiff did not know of the changing of said notes until after the deed had been executed and delivered, and does not know the number of notes so changed; that the notes delivered to plaintiff by Wagner were not good and collectible, but were worthless and uncollectible, and of no value whatever, and a large number of the same were barred by the statute of limitations; that all the said representations made by said Wagner were false and untrue, and were made for the purpose of defrauding this plaintiff out of said premises; that on March 5, 1891, plaintiff tendered said notes back and requested Wagner to reconvey said premises to plaintiff, which he refused to do; that defendant Nettie D. Wagner is the wife of the defendant John

P. Wagner. Plaintiff therefore prays that defendants be required to reconvey said premises to plaintiff, and that the deed to defendant Wagner be annulled and declared fraudulent and void; that the title to said premises may be quieted and confirmed in the plaintiff.

The defendants' answer admits that plaintiff was the owner of the premises described in the petition; that the same were incumbered as alleged; that the defendant John P. Wagner agreed to purchase said land and in payment thereof to assume all of said indebtedness, and did assume the same, and that plaintiff executed and delivered to said John P. Wagner a deed for said premises, subject to said incumbrance; that in addition to assuming the said indebtedness aforesaid the defendant agreed to give the plaintiff \$4,000 in notes, which notes were by defendant John P. Wagner shown to said plaintiff, together with a large number of other notes aggregating the sum of about \$11,000, out of which plaintiff was allowed to select the sum of \$4,000 in notes, which the plaintiff then and there agreed to accept as payment for said farm; denies that John P. Wagner represented that the notes amounted to more than \$4,000, and that all of said notes were good and collectible, and denies that plaintiff relied upon any representations made by said defendant, but alleges the fact to be that the said plaintiff himself selected the said notes from the said \$11,000 worth of notes, and plaintiff took the same upon his own judgment and after due consideration; and defendants deny that, after plaintiff had selected the said \$4,000 worth of notes, the defendant John P. Wagner removed a number of the said notes and inserted in their place other notes of no value whatever; and defendants deny all allegation of fraud in said petition contained, and each and every allegation in said petition contained not specifically admitted or denied. Whereupon defendants ask that plaintiff's action be dismissed.

To this answer the plaintiff in reply filed a general de-

nial, and upon the issues thus made up the case was tried to the court, which found generally for the plaintiff, that all the material allegations set forth in plaintiff's petition are true; that the defendant John P. Wagner obtained the deed of conveyance mentioned in the petition from the plaintiff by fraud and false representations and without consideration. A motion for a new trial was duly filed and overruled, and judgment rendered upon the findings. The defendants bring the case to this court upon error.

A number of assignments of error are relied upon for a reversal of the judgment, great reliance being placed on certain technical points which do not affect the real merits of the controversy. Stripped of all needless verbiage, the case made by the proof is this: Lewis sold his farm to Wagner, who was to assume the incumbrances, except interest to March 1, 1891, and was to give him \$4,000 in notes. Now, were these to be collectible notes or the notes of insolvent makers, or barred by the statute of limitations? The farm seems to have been worth the price agreed to be paid for it. Why, then, should the seller accept worthless paper in payment of the same. It is true he may have done so, but it will require very clear proof that he did, and that the record does not furnish. In our view, the proof, although somewhat conflicting, shows that Lewis was to have \$4,000 in good notes, and as he did not receive such, but relied upon the representations of Wagner to accept those that were worthless in their stead, he is entitled to a rescission of the contract. The judgment is therefore

**AFFIRMED.**

38	326
45	413
38	326
47	275
38	326
50	619
53	76
55	403
55	469

## LEONIDAS K. HOLMES V. FIRST NATIONAL BANK OF LINCOLN.

FILED NOVEMBER 21, 1893. No. 5629.

1. **Negotiable Instruments: INDORSEMENTS: COLLATERAL AGREEMENTS AFFECTING LIABILITY OF INDORSERS: PAROL EVIDENCE.** A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But between the original parties a blank indorsement may be modified by parol. The entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the same.
2. **Directing Verdict.** *Held*, That the court erred in directing a verdict.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

The action was by the First National Bank of Lincoln to recover \$3,400 and interest from Leonidas K. Holmes as indorser of a promissory note of that sum executed by J. G. Hutchins and C. H. Hutchins. The defense pleaded by Holmes is set forth in the opinion. On the trial parol proof was given in defendant's behalf, that at the time of making the indorsement defendant assigned to the bank a mechanic's lien against real estate owned by the makers as a security for payment of the note, and that the officers of the bank agreed, in case the makers made default in payment of the note, that the lien should be foreclosed and the security exhausted before attempting to hold the indorser. Record proof was admitted showing that the security of the mechanic's lien had not been exhausted. On these proofs counsel for the bank moved the court to direct a verdict for plaintiff, on the ground that this oral agreement constituted no defense to the action. This motion was sus-

tained, and a verdict for the bank and against Holmes was directed by the court. A motion for a new trial by Holmes was overruled, and he brings error. *Reversed.*

*Webster, Rose & Fisherdick*, for plaintiff in error:

On demurrer to evidence the party demurring must be treated as admitting all that the jury might infer from the evidence of his adversary. (*Southwest Improvement Co. v. Smith*, 17 Am. St. Rep. [Va.], 59.)

As between the original parties, a contemporaneous parol agreement may be construed with a note so as to defeat it. So far as concerns the immediate contracting parties, a blank indorsement exhibits, at the best, a contract by implication. It is true that, as to *bona fide* holders of paper regularly negotiated, it establishes a liability indisputable if the signature be genuine; but as to holders with notice, or persons taking paper after maturity, the liability may be modified by parol, on proof of fraud, or of facts which make it inequitable for the plaintiff to recover. An indorsement in blank being but a short-hand expression of a contract, may be expanded and explained by parol between the parties with notice. (Wharton, Law of Evidence, sec. 1059; *Kidson v. Dilworth*, 5 Price [Eng.], 564; *Castrique v. Buttigieg*, 10 Moore P. C. [Eng.], 94; *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. C. [U. S.], 480; *Smith v. Morrill*, 54 Me., 49; *Brewer v. Woodward*, 54 Vt., 581; *Hamburger v. Miller*, 48 Md., 317; *Bruce v. Wright*, 3 Hun [N. Y.], 548; *Ross v. Epsy*, 66 Pa. St., 481; *Hudson v. Wolcott*, 39 O. St., 618; *Bailey v. Stoneman*, 41 O. St., 148; *Rothchild v. Grix*, 31 Mich., 150; *Greusel v. Hubbard*, 51 Mich., 95; *Hueske v. Broussard*, 55 Tex., 201; *Preston v. Gould*, 64 Ia., 44; *Dye v. Scott*, 35 O. St., 194; *Lormer v. Bain*, 14 Neb., 178.)

*A. G. Greenlee and Marquett, Deweese & Hall*, contra:

The contract which the law implies from the indorse-

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Holmes v. First Nat. Bank of Lincoln.

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ment of a negotiable note is as conclusive against parol testimony as though it were written out in full above the indorser's signature. (*Doolittle v. Ferry*, 20 Kan., 232; *First Nat. Bank of St. Paul v. Nat. Marine Bank of St. Paul*, 20 Minn., 63; 1 Daniel, Neg. Inst., sec. 719; *Knoblauch v. Crossman*, 37 N. W. Rep. [Minn.], 586; *Eaton v. McMahon*, 42 Wis., 484; *Charles v. Denis*, 42 Wis., 57; *Skelton v. Dustin*, 92 Ill., 49; *Jones v. Albee*, 70 Ill., 34; *Courtney v. Hogan*, 93 Ill., 101; *Martin v. Cale*, 104 U. S., 30; *Rodney v. Wilson*, 67 Mo., 123; *Lewis v. Dunlap*, 72 Mo., 178; Tiedeman, Com. Paper, sec. 274.)

MAXWELL, C. J.

On the 22d day of January, 1890, J. G. Hutchins and C. H. Hutchins made and delivered to the plaintiff Holmes a promissory note for the sum of \$3,400, due in ninety days from date, with ten per cent interest. Afterwards, but at what time does not clearly appear, Holmes indorsed said note in blank and waived demand and notice, and delivered the note to the defendant, and this action is upon the indorsement. Holmes in his answer alleges:

1. That the note was given by the makers for building material furnished by him for the erection of certain buildings in the city of Lincoln, on which he had taken a mechanic's lien, which had been assigned to sureties on the note.

2. That the sureties would not consent to a renewal of the note unless he would proceed to foreclose his lien; that thereupon John R. Clark, the president of the bank, proposed to take the note in question and an assignment of the lien and permit the makers of the note to pay from \$200 to \$400 per month thereon, and that the bank would carry said indebtedness and exhaust the property to which the lien attached before bringing an action against Holmes, and he was required to refrain from prosecuting an action

on the lien; that Holmes did refrain from prosecuting said lien and accepted the note in question and indorsed the same to the bank, it being expressly agreed between Holmes and the bank that it should first exhaust its said security before resorting to an action on the indorsement.

3. "That before plaintiff herein brought this action and refusing to foreclose said lien, though then holder thereof, this defendant, for his own protection and for use of said bank, instituted an action thereon in the name of himself and of said plaintiff in this court against said Hutchins and Hutchins and others, and therein expressly alleged that said plaintiff was entitled to receive all the proceeds of said lien to be applied on said note; and said plaintiff in said action fully affirmed and ratified the same and claimed the benefit of said lien under the assignment thereof; and in the trial of said action said plaintiff, by its cashier, produced in this court the said note, and its cashier was sworn and testified on behalf of the said plaintiff and this defendant, and plaintiff in said action recovered a judgment of foreclosure of said mechanic's lien against each of said pieces of real estate and improvements; but said judgment has in part been appealed from, and is in consequence thereof not yet realized or collected; but said judgment is yet unreversed and is in full force and effect, and said action was pending when this suit was commenced, and then undetermined."

The reply is a general denial.

On the trial of the cause the court directed the jury to return a verdict for the bank, which was done.

The proof tends to show the following facts: The note sued on was a renewal of a former note. The indorsers of the original note were J. H. McClay and J. R. Webster. A mechanic's lien was filed and assigned to Webster and McClay as indemnity against their indorsement. When the note became due foreclosure was commenced by Holmes. Then Hutchins proposed to Holmes to borrow at the bank

for Holmes. Clark, the president of the bank, sent for Holmes and said, in substance, that he was willing to let Hutchins have the money if Holmes would assign the lien to the bank, and he would release McClay and Webster as sureties. Holmes' counsel advised him not to risk any further delay in collecting from Hutchins; but, through the importuning of Hutchins and Clark, the suit was stopped and Holmes made a transfer of his mechanic's lien to the bank and delivered the security to Mr. Clark. Hutchins had agreed to pay from \$200 to \$400 a month until the note was paid, and Clark agreed to take this mechanic's lien as security for the note until such time as it was paid. Clark thought Hutchins would pay the note, and it would get Hutchins out of his embarrassment until he could dispose of his property. There was this agreement, that, in indorsing that note, Clark took the lien as security, and if there should ever be any trouble there would be nothing done until that lien was exhausted. After the note became due the bank, when about to institute foreclosure suit, discovered a discrepancy in the description of one piece of the property, and Mr. Callahan, the cashier, directed Holmes to begin foreclosure, which was done. The petition in the foreclosure suit, founded on the lien and note sued on here, was given in evidence; so also were the original mechanic's lien and assignments thereof and the decree in the foreclosure suit. The suit on the lien was commenced September 19, 1890, more than a month prior to the bringing of this action. The principal question in this case is the right to permit proof of a contemporaneous parol agreement to explain or qualify a blank indorsement of a promissory note in an action between the parties.

In *Dye v. Scott*, 35 O. St., 194, the supreme court of Ohio in an able opinion discusses the question. It is said: "There are authorities which hold that the contract which the law implies or presumes in such cases is as conclusive and certain as if written out in full, and that parol evi-

dence is not admissible to vary or contradict it. The reason given for requiring such strictness, in substance, is that the indorsement adds to the value of the instrument by giving it currency in commercial transactions; and that its value would be impaired and circulation restricted by admitting oral testimony to vary or contradict the terms of the contract which the law presumes or implies from the indorsement, even as between indorser and indorsee. (See *Bank of United States v. Dunn*, 6 Pet. [U. S.], 51; *Dale v. Gear*, 38 Conn., 15; *Barnard v. Gaslin*, 23 Minn., 192; *Bartlett v. Lee*, 33 Ga., 491.) While we sanction the doctrine that upholds the credit and negotiability of commercial paper in the hands of any *bona fide* holder for value, we do not, in order to accomplish this, see the necessity of carrying the doctrine quite so far as it is carried in the cases above cited. As between the indorser and indorsee, we regard the blank indorsement as only *prima facie* evidence of the contract which the law presumes to arise therefrom. If the indorsement is made upon no other, that contract will control the rights of the parties. If there was a contemporaneous contract between the parties upon which the indorsement was made, both reason and justice require that, as between themselves, the actual and not the presumed contract should be enforced; and, as between them, oral testimony should be admissible to prove the contemporaneous contract. This will not be necessary, or even probably impair the currency or credit of the instrument as commercial paper. Prior parties to it will not be affected, nor will the rights of subsequent indorseees without notice be impaired or limited in any degree. As to all the world except the parties to the special contract, and as between themselves only, the character of the instrument as commercial paper will remain unaffected." To the same effect, *Hudson v. Wolcott*, 39 O. St., 618.

In *Bailey v. Stoneman*, 41 O. St., 48, the court held: 'The indorsement being in blank, parol evidence of what

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was said by the parties in and about the transfer was properly admitted. *Dye v. Scott*, 35 O. St., 194, followed.

"2. The indorsement *prima facie* implied that the indorser assumed its usual obligations, and upon him rested the burden of proving a different understanding and agreement.

"3. If the evidence justified a finding that the then understanding or agreement was that the indorser assumed the usual obligation, the fulfillment by E. T. B. of his contract to build applied as a consideration to support the transfer of the note as made."

In *Preston v. Gould*, 64 Ia., 44, 19 N. W. Rep., 834, this rule was approved, and undoubtedly is the law of the modern cases. A blank indorsement of a negotiable instrument before due, where the transfer is to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. But as between the original parties, a blank indorsement may be modified by parol. At most it is only *prima facie* evidence of the contract which the law implies therefrom. Between the parties the entire transaction may be shown, although a part of it is in writing and a part rests in parol; that is, what was the actual contract between the parties? And oral testimony is admissible to prove the actual agreement. This does not affect the paper as to third persons who have no notice of this agreement, where the paper is transferred before due for a valuable consideration. (Wharton, Evidence, sec. 1059; *Kidson v. Dilworth*, 5 Price [Eng.], 564; *Castrique v. Buttigieg*, 10 Moore P. C. [Eng.], 94; *Susquehanna Bridge & Bank Co. v. Evans*, 4 Wash. C. C. [U. S.], 480; *Smith v. Morrill*, 54 Me., 48; *Brewer v. Woodward*, 54 Vt., 581; *Hamburger v. Miller*, 48 Md., 317; *Bruce v. Wright*, 3 Hun [N. Y.], 548; *Ross v. Espy*, 66 Pa. St., 481; *Hudson v. Wolcott*, 39 O. St., 618; *Bailey v. Stoneman*, 41 O. St., 148; *Rothschild v. Grix*, 31 Mich., 150; *Greusel v. Hubbard*, 51 Mich., 95; *Hueske v. Broussard*, 55 Tex., 201; *Preston v. Gould*, 64 Ia., 44.)

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In the case at bar the court should have submitted the testimony to the jury, and it erred in directing a verdict. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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VACLAV ROH V. VACLAV VITERA ET AL.

FILED NOVEMBER 21, 1893. No. 6418.

1. **Final Order.** An order of the district court vacating its own judgment rendered by default, and permitting the defendant to answer at the same term at which the judgment is rendered, is not a final order.
2. **A motion to vacate a judgment** must assign reasons for the proposed action of the court, but if the causes are set forth in an accompanying paper and submitted to the court in that form and acted upon by it, a reviewing court will not declare its ruling thereon void, although it may be erroneous.
3. **Final Order: REVIEW.** A mistake in the third point in the syllabus in *Hansen v. Bergquist*, 9 Neb., 269, corrected by substituting the words "an execution and" for "a judgment."

**ERROR** from the district court of Butler county. Tried below before WHEELER, J.

Motion by defendants in error to dismiss on the ground that the order complained of in the petition in error is not a final order. The order sought to be reviewed vacates a judgment by default and grants defendants leave to answer. *Motion sustained.*

*George P. Sheesley, Sheesley & Aldrich, and Matt Miller,*  
for the motion:

No judgment or order which does not determine the

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rights of the parties in the cause, and preclude further inquiry as to their rights in the premises, is a final judgment. The order in question was not, therefore, a final determination, and is not conclusive. (*Hall v. Vanier*, 7 Neb., 398; Code, sec. 581.)

An order vacating a judgment by default during the same term at which it was rendered, to enable defendant to make a defense, is not a final order. (*Brown v. Edgerton*, 15 Neb., 454.)

The power of the district court over its own judgments during the term at which the judgment is rendered is entirely discretionary, and not subject to review by the supreme court. (*Wise v. Frey*, 9 Neb., 220; *Smith v. Pinney*, 2 Neb., 145; *Huntington v. Finch*, 3 O. St., 445; *Taylor v. Fitch*, 12 O. St. 169; *Volland v. Wilcox*, 17 Neb., 50.)

*Evans & Hale* and *Frick & Dolezal*, contra:

The order of the court attempting to set aside the judgment rendered by default is null and void, because no ground is set out or claimed for which the court had power to order it to be set aside. (*Spencer v. Thistle*, 13 Neb., 227.)

MAXWELL, C. J.

This action was brought in the district court of Butler county on the 2d day of August, 1892, by the plaintiff against the defendants upon a contract for the erection of a church. It is alleged, in substance, in the petition that the defendants are a voluntary religious association; that in the year 1891 they had a building to be used for a church, partially completed; that they employed the plaintiff to complete the same, and promised to pay him the amount paid by him for labor and material and a reasonable compensation for his own services; that he then completed the building, and it has been accepted by the defendants; that the defendants have paid thereon more than \$3,500, and there

still remains due the sum of \$2,028, for which this suit is brought. It seems that after suit was brought there was an effort made by the parties to settle the matter and not permit the case to go to trial, and on August 27, 1892, the plaintiff and the priest of the congregation entered into the following agreement:

“ABIE, September 27, 1892.

“It is hereby agreed between the congregation of Sts. Peter's and Paul's Church of Abie and Vaclav Roh:

“1. That Vaclav Roh will withdraw all lawsuits, liens, and bills of every and any kind which he has at present or ever did have against the congregation of Sts. Peter's and Paul's church for building a church or for labor performed or for material furnished, or for any cause whatever; and he, Vaclav Roh, further agrees to remove all liens, dismiss all lawsuits, and forever quitclaim all bills of every kind which he may have now or ever did hold; and further, that Vaclav Roh will pay all costs for liens and actions at law, sheriff's fees, and every cost caused by an action at law.

“2. The congregation agrees to pay Vaclav Roh the sum of \$10 per member, number of members unknown, the payment to be made as follows: On or before January 1, 1893, the sum of \$5 is to be paid by each member, the balance, \$5, is to be paid by each member on or before January 1, 1894; but this agreement does not bind the aforesaid members of Sts. Peter's and Paul's church individually nor collectively to pay the amounts as above stated, but they may pay the amount at any time, not later than January 1, 1894.

“3. This agreement guaranties to each member paying \$10 to Vaclav Roh that he, the member so paying, shall be forever exempt from any further payment to Vaclav Roh; and further, that Vaclav Roh shall bring no action at law against any member so paying at present, nor at any future time.

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4. The amounts to be paid as above stated shall bear no interest whatever until January 1, 1894.

"REV. JOSEPH KOUTEK.

"VACLAV ROH.

"Witnesses :

"T. F. MAHONEY.

"V. H. SIMERKA.

"F. F. VOREL."

On the 9th day of March, 1893, a default was entered against the defendants and judgment taken for the sum of \$1,374.60. On the 12th of April of the same year a motion was made to set aside the default and for leave to answer. This motion was sustained and leave given the defendants to answer in forty days. From the order setting aside the default and granting leave to answer the plaintiff brings the case into this court by petition in error. The defendants now move to dismiss the action because there is no final judgment. The plaintiff lays considerable stress upon the form of the motion to set aside the default. The motion is as follows :

"Come now the defendants named in the cause above entitled, and move the court that the default and judgment heretofore at this present term of this court taken and rendered, to-wit, on the 9th day of March, 1893, be set aside and that said judgment be vacated for reasons set forth in the affidavit of one of said defendants hereto attached."

The affidavit referred to in the motion is as follows :

"THE STATE OF NEBRASKA, } ss.  
BUTLER COUNTY.

"Anton Ptacek, being duly sworn, deposes and says that he is one of the defendants in the cause above entitled ; that said defendants, on and prior to the 9th day of March, 1893, had not employed any attorney or attorneys to look after the interests of said defendants in this cause, by reason of certain overtures of settlement of this controversy made by the plaintiff ; that on account of the mutual desire of

the plaintiff and defendants against whom this action was first instituted that this controversy might be settled without trial, this cause was allowed to remain without any active prosecution for judgment on the part of the plaintiff, and without the preparing and filing an answer on the part of the defendants to the petition of the plaintiff; that the defendants were led to believe by the plaintiff that this cause would not stand for trial before January 1, 1894; that the plaintiff led the defendants to believe that upon their paying a certain amount of money, much less than the sum for which judgment was herein rendered, on or before the 1st day of January, 1894, that the case would be dismissed by reason of such settlement; that a part of the facts hereinbefore recited appear of record among the files in this cause; that under the inducements held out by the plaintiff for settlement of this controversy, this cause would not stand for trial until after January 1, 1894. For all of which reasons the defendants refrained from interposing a defense to this action, wherefore default against the above named defendants was allowed.

“ANTON PTACEK.

“Subscribed in my presence and sworn to before me this 12th day of April, 1893.

“[SEAL.]

ED. G. HALL, C. D. C.

A motion should contain within itself all the reasons relied upon for the action of the court, but where that course is not pursued, but the reasons are assigned in a separate paper and acted upon by the trial court without objection, we have simply to consider the reasons assigned, and not the form in which they are presented. The question of the propriety of setting aside the default for the reasons assigned, however, does not arise in this motion.

The plaintiff relies upon the case of *Spencer v. Thistle*, 13 Neb., 227, in which it was held that a new trial can only be granted after judgment for specific causes, which must be assigned in the motion for a new trial. In that

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case the motion was: defendant "upon all the pleadings, proceedings, and records herein, moves the court for an order vacating judgment herein and to set aside report of referee and vacate said reference and allow defendant to answer, and that said action may stand for trial before a jury." No particular cause was pointed out, and the court held, properly we think, that some particular cause must be assigned to authorize the court to grant a new trial. It will be seen in the case at bar that causes are assigned in the affidavit which, whether sufficient or not, are not before the court. The case cited, therefore, is not applicable.

In *Hansen v. Bergquist*, 9 Neb., 269, a motion was made in the district court to quash an execution issued on a transcript of judgment from the county court upon the ground that the judgment had been set aside by the county court. The motion was sustained and the execution quashed. From this order the case was taken to the supreme court, where the order was reversed upon the ground that the judgment was valid. Inadvertently it is stated in the syllabus that an order setting aside a "judgment" may be reviewed on error. It should have been an order setting aside an execution, where it affects a substantial right. That was the point presented to the court, and the syllabus in the case will be so corrected.

In *Brown v. Edgerton*, 14 Neb., 453, it was held that an order made at the same term vacating a judgment was not a final order, and therefore not subject to review by proceedings in error, and such we understand to be the rule. There is no final order, therefore, from which a petition in error will lie, and the motion to dismiss must be sustained.

DISMISSED.

# POWDER RIVER LIVE STOCK COMPANY V. CHARLES L. LAMB.

FILED NOVEMBER 21, 1893. No. 4730.

1. **Statute of Frauds: A VERBAL CONTRACT**, to be void under the first clause of section 8 of our statute of frauds, must be one that, by its terms, is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time.
2. **An oral agreement entered into in October, 1886, for the sale and delivery by plaintiff to defendant of a quantity of corn of more than \$50 in value, by the terms of which the seller was to receive the market price paid for corn in the county on any day between the time of delivery and May, 1888, is not within the 8th section of our statute of frauds, since performance within one year is possible.**
3. **Oral Contract of Sale.** Under section 9, chapter 32, Compiled Statutes, an oral contract for the sale and delivery of personal property of over \$50 in value, no part of which has been accepted or received by the buyer, is invalid where no part of the purchase money was paid at the time the contract was entered into, and where no note or memorandum of the contract was made in writing, and subscribed by the party to be charged thereby.
4. **A delivery alone by the vendor is not sufficient to take the contract out of the statute, but there must also be a receipt and acceptance of the thing sold by the vendee, to have that effect.**
5. **In an action upon a contract within the statute of frauds, the petition must state facts taking the contract out of the statute, or the pleading will be demurrable.**
6. **Contract of Sale: STATUTE OF FRAUDS: PLEADING.** Under a general denial of the allegations in a petition upon a parol agreement for the sale and delivery of personal property, void under the statute, the defendant may avail himself of the defense that such agreement is invalid under the statute of frauds.
7. **The general agent or manager of a corporation carrying on the business of raising and feeding of cattle is presumably empowered to purchase feed for the stock belonging to the corporation.**

38	339
43	196
38	339
44	30
38	339
46	233
38	339
47	415
48	278
38	339
52	434
52	444
53	568
54	280
38	339
62	751

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Powder River Live Stock Co. v. Lamb.

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8. **Quantum Meruit: SPECIAL CONTRACT.** A party cannot recover upon a *quantum meruit* where he pleads and relies on the trial solely upon a special contract.
9. **Erroneous Instructions: HARMLESS ERROR: REVIEW.** This court will not reverse a judgment for the giving of an erroneous instruction, where it appears that the party complaining was not prejudiced thereby.
10. **Trial: REFUSAL TO GIVE PROPER INSTRUCTION: REVIEW.** It is reversible error to refuse an instruction containing a correct proposition of law applicable to the issues in the case, the principles of which have not been covered by the charge of the court.

ERROR from the district court of Stanton county. Tried below before POWERS, J.

The opinion contains a statement of the case.

*C. C. McNish and Allen, Robinson & Reed*, for plaintiff in error:

The answer of the defendant denies the several allegations of the petition and presents the question of the statute of frauds as one of the issues in the case. By the general denial the defendant had a right to avail itself of the invalidity of the agreement under the statute of frauds. It was unnecessary to plead the statute as a special defense. (Browne, Statute of Frauds [3d ed.], sec. 511; 8 Am. & Eng. Ency. Law, 747, note 2; *Berrien v. Southack*, 7 N. Y. Supp., 324; *Fountaine v. Bush*, 41 N. W. Rep. [Minn.], 465; *Tatge v. Tatge*, 34 Minn., 272; *Smith v. Theobald*, 5 S. W. Rep. [Ky.], 394; *Wiswell v. Tefft*, 5 Kan., 263; *Bonham v. Craig*, 80 N. Car., 224; *Morrison v. Baker*, 81 N. Car., 76; *Amburger v. Marvin*, 4 E. D. Smith [N. Y.], 393; *Harris v. Knickerbacker*, 5 Wend. [N. Y.], 638.)

A party cannot recover on *quantum meruit* under an allegation setting up a special contract. (*Eyser v. Weissgerber*, 2 Ia., 463; *Freher v. Geeseka*, 5 Ia., 472; *Formholz v. Taylor*, 13 Ia., 500.)

The court erred in giving conflicting instructions. (*Wasson v. Palmer*, 13 Neb., 376.)

The court erred in refusing to give the twelfth instruction asked by the defendant. (*Severance v. Melick*, 15 Neb., 614; *Housel v. Thrall*, 18 Neb., 488.)

*W. W. Young, and John A. Ehrhardt, contra:*

If the court erred in overruling the demurrer to the petition, defendant waived the error by answering over, and going to trial upon the merits. (*Pottinger v. Garrison*, 3 Neb., 223; *Mills v. Miller*, 2 Neb., 308; *Harral v. Gray*, 10 Neb., 188; *Dorrington v. Minnick*, 15 Neb., 400; *Buck v. Reed*, 27 Neb., 70.)

The defense that a contract is within the statute of frauds, to be available to defendant, must be specially pleaded. (*Lawrence v. Chase*, 54 Me., 196; *Graffam v. Pierce*, 143 Mass., 386; *Brigham v. Carlisle*, 78 Ala., 243; *Martin v. Blanchett*, 77 Ala., 288; *Guynn v. McCauley*, 32 Ark., 97; *Trapnall v. Brown*, 19 Ark., 39; *Peet v. O'Brien*, 5 Neb., 362.)

A contract is not void by the statute of frauds, as an agreement not to be performed within a year from the making thereof, if the performance of it depends upon a contingency which may happen within the year, although in fact it does not happen until after the expiration of the year. (*McCormick v. Drummatt*, 9 Neb., 388; 8 Am. & Eng. Ency. Law, 690, notes 1, 2.)

NORVAL, J.

This was an action commenced by Charles L. Lamb to recover of plaintiff in error \$1,849.15 and interest thereon, as a balance due for a quantity of corn alleged to have been sold and delivered by plaintiff to defendant. The amended petition upon which the case was tried alleges:

"1. That said defendant is a corporation duly organized

and existing under the general laws of the state of Colorado, and doing business in Stanton county, Nebraska.

“2. That some time in the month of October, 1886, the precise date whereof the plaintiff is unable to more specifically state, the plaintiff and defendant entered into a verbal contract, by the terms of which the plaintiff sold to said defendant above named all the corn that he then had on hand, including the crop of corn then standing in the fields of the plaintiff; and in consideration of the sale and delivery of said corn to the defendant, the said defendant agreed to pay the plaintiff the market price per bushel paid for corn in the said county of Stanton, in the state of Nebraska, on any day, to be selected by the plaintiff, between the time of delivery of said corn and the month of May, 1888, and on the day so selected by the plaintiff the amount then due the plaintiff should at once become due and payable.

“3. That in pursuance of said contract the plaintiff delivered to the defendant in the month of November, 1886, 143 bushels and 35 pounds of ear corn; and from the 21st day of December, 1886, to the 5th day of April, 1887, 782 bushels and 30 pounds of ear corn; and on the 30th day of December, 1886, 1,259 bushels of shelled corn; and in the month of January, 1887, 5,090 bushels of shelled corn and 25 pounds; and that the total number of bushels sold and delivered amounted in the aggregate to 7,275 bushels; and the plaintiff states that he is unable to more fully state the time and the amount of the delivery of said corn than in this paragraph stated.

“4. On the 1st day of February, 1888, the plaintiff, in order to fix and establish the price to be paid by the defendant for the corn delivered as aforesaid, served notice on the defendant that he had selected the market price per bushel paid for corn in Stanton county, Nebraska, on that date, to-wit, the 1st day of February, 1888.

“5. That the market price paid for corn on the said 1st

day of February, 1888, in Stanton county, Nebraska, was thirty-five cents per bushel.

“6. That on the 4th day of January, 1887, the defendant advanced to the plaintiff on said corn, the sum of two hundred (200) dollars, and on the 12th day of January, 1887, the further sum of four hundred and fifty (450) dollars, for which money so advanced the plaintiff afterwards agreed to pay the defendant interest thereon until the date of the selection of the market price per bushel to be paid for said corn.

“7. That there is due from the defendant to the plaintiff for the said corn, so delivered under the terms of said contract, the sum of two thousand five hundred and forty-six and twenty-five one-hundredths (2,546.25) dollars, no part of which has been paid, except the said sum of \$650, which with the interest thereon, as agreed between plaintiff and defendant, amounts to the sum of \$697.10.

“8. That after allowing to the defendant all just credits, there is still due and unpaid from the defendant to the plaintiff the sum of one thousand and eight hundred forty-nine and fifteen one-hundredths (1,849.15) dollars, together with the interest thereon, at the rate of seven per cent from the said 1st day of February, 1888.”

The defendant interposed a general demurrer to the amended petition, which was overruled by the court, and an exception was taken to the decision. The defendant then filed an answer alleging:

“1. That on or about the 24th day of December, 1886, L. R. Crosby, as the general manager of the feeding department of said defendant, made an oral agreement with said plaintiff, whereby the said plaintiff was to sell and deliver at the ranch of defendant in Stanton county, Nebraska, all the corn and oats that he then owned near Piller, and two car loads of corn to be shipped from Stanton, and said defendant agreed to pay said plaintiff for said corn and oats the average market price between the Stanton and

Pilger market on the day that said plaintiff selected and called for his money, between about the 24th day of December, 1886, and the 1st day of May, 1887, and that said plaintiff was to reduce said contract to writing in duplicate and sign them, and forward them to said L. R. Crosby for the same to be signed by said defendant, and one to be returned to said plaintiff.

"2. That said plaintiff failed and neglected to reduce said contract to writing, as agreed, and there is no note or memorandum of said agreement as required by law.

"3. That in accordance with said oral agreement made on or about the 24th day of December, 1886, with said L. R. Crosby for said defendant, the said plaintiff delivered at the ranch of said defendant, in Stanton county, Nebraska, at various dates, a total of nine hundred and twenty-five (925) bushels and sixty-five (65) pounds of ear corn; and six thousand three hundred and forty-nine (6,349) bushels and thirty-five (35) pounds of shelled corn; and nineteen hundred and ninety-four (1994) bushels and twenty-seven (27) pounds of oats.

"4. That on the 25th day of April, 1887, in accordance with the contract made on or about the 24th day of December, 1886, the said plaintiff had a settlement with said defendant as to the oats, and on said date defendant paid said plaintiff for said oats the sum of \$359.10.

"5. That on the 4th day of January, 1887, the said defendant loaned to said plaintiff the sum of \$200, and on the 12th day of January, 1887, said defendant loaned said plaintiff the further sum of \$450; and said plaintiff agreed to pay said defendant interest on said money, and that the same was to be settled and adjusted and deducted from amount that defendant might owe the plaintiff.

"6. The defendant, in further answer to the petition of the plaintiff, admits the allegation contained in paragraph 1 of said petition; but as to all other paragraphs in said petition it denies each and every allegation therein contained."

For reply, the plaintiff admits that he delivered the quantity of oats and corn stated in the answer; denies that the same were delivered under the contract set up by the defendant in its answer; alleges that the oats and corn were sold and delivered under separate and distinct contracts; denies each and every other allegation set forth in the answer.

The action was tried in the court below to a jury, who returned a verdict in favor of the plaintiff for \$2,142.38. The plaintiff filed a remittitur of \$1.25, and the court overruled the defendant's motion for a new trial, and entered judgment in favor of plaintiff upon the verdict of the jury. The defendant brought the case to this court for review by proceeding in error.

The defendant objected in the district court to the introduction of any evidence in the case, for the reason that the contract stated in the petition is within the statute of frauds, and is therefore void, which objection was overruled by the court. The plaintiff thereupon introduced evidence tending to prove every allegation of the petition, and rested. The testimony on behalf of the defendant tended to establish that the contract entered into between the parties relating to the sale and purchase of the corn, is the one pleaded in the answer; that the corn was delivered by the plaintiff to the defendant under said agreement, and that corn at the time the same was delivered, as well as in May, 1887, was worth on the market in Stanton county twenty cents per bushel. The court, at the request of the defendant, submitted to the jury special findings, which were answered by them and returned with their general verdict. By the third finding they found that the contract between the parties was as claimed by the plaintiff, and that the corn was delivered thereunder.

The most important question presented for our consideration is whether or not the contract set out in the petition is within the statute of frauds.

Section 8 of chapter 32 of the Compiled Statutes declares that "In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First—Every agreement that by its terms is not to be performed within one year from the making thereof. Second—Every special promise to answer for the debt, default, or misdoings of another person. Third—Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry. Fourth—Every special promise by an executor or administrator to answer damages out of his own estate."

The contention of the plaintiff in error is that the contract declared on is void under the first subdivision of the section above quoted, and that the same is not actionable or enforceable in the courts, for the reason the agreement rested solely in parol, and was not to be performed by either party within the period of one year from the date of the making of the same.

The defendant in error in his argument insists that the agreement in question does not fall within the clause of the section already mentioned; that the statute only applies to executory contracts, and not one which has been fully performed on one side. The authorities upon the question are divided. Some of the courts of the country hold that an action cannot be maintained upon a parol agreement, which by its terms is not to be performed within a year, even though made upon a valuable consideration fully executed, while other courts of equal standing and ability lay down the doctrine that full performance on one side takes the contract out of the statute, and that it is enforceable. We are not now called upon to examine the conflicting decisions, or to determine which is the true doctrine, as the question does not necessarily arise in this case. If we are able to comprehend the force and effect of the agreement in question, it is not within the scope of the statutory

provision set out above. A contract, in order to be within the purview of said section, must be such that, by its terms, cannot be performed within one year from the making thereof. The statute does not include a verbal agreement which may possibly or probably not be performed within a year, nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period. When a contract, not in writing, by its terms, or by any fair and reasonable construction of its provisions, is capable of being performed within a year, it is not within the statute. This was settled by the adjudications in this court in *McCormick v. Drummatt*, 9 Neb., 388; *Connolly v. Giddings*, 24 Neb., 131, and *Kiene v. Shaeffing*, 33 Neb., 21, and it is unnecessary to refer to the decisions of other courts sustaining the doctrine of our own cases.

Let us examine and see whether the agreement alleged and proved was capable of performance within a year from the time the same was entered into. The plaintiff below sold to the defendant all of his corn, including the crop then in the field. The contract contained no stipulation as to the time when the corn should be delivered to the defendant. True, by the terms of the agreement, plaintiff was to receive for the corn the market price paid for such grain in Stanton county on any day that should be thereafter designated by him between the time of delivery and May, 1888, but this provision did not bring the contract within the statute. Although the agreement was not performed within a year from its making, as regards the selection of the date upon which to fix the price the seller should receive for the corn, yet there was nothing in the terms thereof which prevented it from being performed within the year. Under the terms of the agreement, plaintiff had a perfect right, had he so desired, to have selected such date at once, and without delay, even on the next day after the corn was delivered. It was entirely optional with him to

do so or not. The agreement was therefore capable of performance within a year from its making, and is not void by reason of the statute under consideration. No case can be found reported in the books, in the opinion of the writer, of similar facts, where it has been held that such a contract was within the purview of the statute. On the contrary, the doctrine established by the adjudications of this country is that, in order to bring a case within the operation of the statute of frauds, there must be an express and specific stipulation in the contract that it is not to be performed within the year, or it must appear therefrom that it was not the intention of the parties the agreement should be performed within that period. (*Supra*; *Treat v. Hiles*, 32 N. W. Rep. [Wis.], 517; *Baker v. Lauterback*, 11 Atl. Rep. [Md.], 703; *Aiken v. Nogle*, 47 Kan., 96; *Durham v. Hiatt*, 127 Ind., 514; *Kent v. Kent*, 62 N. Y., 560; *Barton v. Gray*, 57 Mich., 622; *Horner v. Frazier*, 4 Atl. Rep. [Md.], 133; *Smalley v. Greene*, 3 N. W. Rep. [Ia.], 78.)

The next contention of plaintiff in error is that the contract is void under section 9 of said chapter 32, which is in the following language:

"Sec. 9. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless: First—A note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby; or, Second—Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or, Third—Unless the buyer shall, at the time, pay some part of the purchase money."

The contract declared upon in the amended petition is a verbal one for the sale of a quantity of corn exceeding in value the sum of \$50. No part of the purchase money was paid at the time the contract was entered into. This is conceded; but the plaintiff below insists that the stipulations in the contract have been fully performed on his part;

hence, the statute of frauds does not attach. The delivery of the corn by the plaintiff to the defendant is averred in the petition, but it is nowhere alleged in the pleading that the defendant accepted or received any part thereof. A delivery alone by the vendor of the thing sold is insufficient to take a parol contract for the sale of goods, of the price of \$50 or more, out of the statute, but there must also be a receipt and acceptance by the buyer of at least a part of such goods under and in pursuance of the terms of the contract. In Reed on the Statute of Frauds, vol. 1, sec. 262, the author says: "There must be both delivery and acceptance; and both of the parties must partake in the same act. \* \* \* And it has been said that certainly unless accept means no more than received, as surely it must, for otherwise the word 'deliver' would of itself have sufficed, acceptance must mean some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so. To constitute acceptance two acts are necessary: The goods must be accepted and actually received. No act of the seller will amount to acceptance."

The doctrine of the text is amply sustained by numerous judicial decisions. See the following authorities: *Ex parte Parker*, 11 Neb., 309; *Caulkins v. Hellman*, 47 N. Y., 449; *Smith v. Brennan*, 62 Mich., 349, 28 N. W. Rep., 892; *Hansen v. Roter*, 25 N. W. Rep. [Wis.], 530; *Jamison v. Simon*, 8 Pac. Rep. [Cal.], 502; *Fontaine v. Bush*, 40 Minn., 141; *Simmons Hardware Co. v. Mullen*, 33 Minn., 195; *Taylor v. Mueller*, 15 N. W. Rep. [Minn.], 413.

In *Ex parte Parker*, *supra*, this court quoted with approval the following language used by the New York court in the opinion in *Caulkins v. Hellman*, 47 N. Y., 449: "No act of the vendor alone in performance of a contract void by the statute of frauds can give validity to such contract. \* \* \* Where a valid contract of sale is made in writing, a delivery pursuant to such contract will pass the title

at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract will pass the title to the vendee without any acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title, or make the vendee liable for the price."

Acceptance is the receipt of a thing with the intention to retain it. In order to constitute a binding acceptance under a contract for the sale of personal property, invalid by the statute of frauds, there must be some equivocal act on the part of the purchaser showing an intention to accept and appropriate the property as owners. (*Stone v. Browning*, 68 N. Y., 601; *Simpson v. Krumdick*, 28 Minn., 355; *Taylor v. Mueller*, 15 N. W. Rep. [Minn.], 413.) In a suit upon a contract within the statute of frauds, the petition must state facts taking the contract out of the statute, or the pleading will be demurrable. (*Babcock v. Meek*, 45 Ia., 137; *Burden v. Knight*, 82 Ia., 584.) The conclusion is irresistible that the allegation of the delivery of the corn is not sufficient to take the contract out of the operation of the statute, and therefore the demurrer to the amended petition should have been sustained.

It is urged that the defendant waived its exception to the ruling on the demurrer by answering to the merits. Conceding this point to be well taken, still the question of the statute of frauds was repeatedly raised during the trial on the introduction of testimony to establish the contract and to show the defendant accepted the corn under the terms of the parol agreement. This evidence was admitted over the objection of the defendant that it is not alleged in the petition that it accepted or received any part of the corn sued for, and that the contract was void under the statute. This evidence was clearly inadmissible, without the pleading was amended. It is a fundamental rule that the *allegata et probata* must agree.

It is claimed that the statute of frauds is not available as a defense in this case for the reason that it is not set up in the answer. The defendant, in its pleading, denies the making of the contract upon which the action was brought; sets up an entirely different agreement for the purchase and sale of the corn. There was no waiver of the statute by the failure to plead it as a special defense. Under the general denial, the defendant had the right to avail itself of the invalidity of the agreement under the statute of frauds. The plaintiff, in order to recover, was obliged to prove his contract substantially as alleged, and a receipt and acceptance of the corn under it. (Browne, Statute of Frauds, sec. 511; *Russell v. Wisconsin, M. & P. R. Co.*, 39 N. W. Rep. [Minn.], 302; *Cosand v. Bunker*, 50 N. W. Rep. [S. Dak.], 84; *Tatge v. Tatge*, 34 Minn., 272; *Taylor v. Allen*, 40 Minn., 433; *Fontaine v. Bush*, 40 Minn., 141; *Berrien v. Southack*, 7 N. Y. Supp., 324; *Smith v. Theobald*, 5 S. W. Rep. [Ky.], 394; *Wiswell v. Tefft*, 5 Kan., 263; *Bonham v. Craig*, 80 N. Car., 224; *Popp v. Swanke*, 68 Wis., 364.)

The last was an action to enforce specifically the performance of an oral agreement for the sale of land. The defendant neither pleaded the statute of frauds, nor objected to the admission of evidence on the trial, because the contract was within the statute, but at the close of the trial requested the court to find as a fact that the contract rested in parol, and, as a conclusion of law, that it was void. It was held that the question of the validity of the agreement was sufficiently raised. There are a few cases which hold that the statute of frauds must be specially pleaded to be available, some of which are cited in the brief of defendant in error, but the decided weight of the decisions, as well as the better reason, is the other way.

We will next notice an assignment of error based upon a ruling of the court on the introduction of the testimony. The plaintiff below was permitted to prove, over objections

of the defendant, that the contract upon which the action was brought was made with the defendant through its general manager, J. A. Brown. It is insisted that this testimony was inadmissible until it had first been shown that Brown had authority to make such a contract. We do not agree with counsel in this proposition. It had been shown, by competent evidence, that Mr. Brown was the general manager of the defendant corporation, before any attempt was made to prove the contract entered into by him for his company for the purchase of the corn. Therefore, it was unnecessary to show that he had authority to make the contract, the presumption being that he was invested with such power.

Complaint is made of the giving of the fourth paragraph of the court's charge to the jury, which is as follows:

"4. The defendant in *his* (its) answer denies the making of the contract sued on, and alleges that the price agreed to be paid for the corn purchased of the plaintiff was the average market price between Stanton and Pilger markets, in said county, on a day to be selected by the plaintiff, between December 24, 1886, and May 1, 1887."

The above was one of several instructions given, stating the issues in the case, and, when taken in connection with the other instructions, was not misleading. It clearly, and in concise language, stated to the jury one of the issues presented by the pleading and the evidence.

Exception was taken to the giving of the following instruction:

"8. But if you find that there was no agreement made as to the price the plaintiff was to receive for said corn, then you should award him for the corn received by the defendant, and unpaid for, the fair market value of the same at the time of its delivery as shown by the evidence, if any such evidence is before you, with interest thereon from the time of its delivery, at the rate of seven per cent per annum."

This instruction should not have been given. The action is grounded upon an express contract. The petition contains no allegation of a *quantum meruit*. Where a contract for the sale of personal property is void under the statute of frauds, and there has been a delivery of the thing sold to the purchaser and an acceptance thereof by him, the plaintiff may recover the reasonable value of the property, if his petition is so framed; but a party cannot recover on a *quantum meruit*, where he pleads and relies solely upon a special contract. (*Eyser v. Weissgerber*, 2 Ia., 463; *Freher v. Geeseka*, 5 Ia., 472; *Formholz v. Taylor*, 13 Ia., 500; *Imhoff v. House*, 36 Neb., 28.)

The instruction under consideration was in direct conflict with instruction No. 5, given by the court, which told the jury that "before the plaintiff is entitled to a verdict for the amount sued for, it is incumbent upon him to prove by a preponderance of the evidence that he made the contract with the defendant as alleged, whereby the defendant agreed to pay the plaintiff the market price of the corn in Stanton county on a day selected by him between the time of delivering the same and the first of May, 1888." By the one instruction the jury were informed that the plaintiff could only recover in case the evidence established a special contract, while by the other they were told he was entitled to the market value of the corn, even though there was no stipulation as to the price he was to receive therefor. These conflicting statements of the law before the jury left them in doubt as to the paragraph upon which they should rely. It should be stated that instruction No. 8 was predicated upon evidence introduced by the defendant and against the objection of the plaintiff below, showing the market value of the corn at the time of its alleged delivery. We are persuaded, however, that the defendant was not in the least prejudiced by the giving of this instruction, since had the jury, in arriving at their verdict, allowed the plaintiff the market value of the corn, the recovery would have been

scarcely one-half the sum stated in the verdict. It is obvious that the recovery was upon the basis of the special contract alleged by the plaintiff.

The defendant asked, and the court refused to give, the following instruction:

"12. If the contract claimed by the plaintiff, in his petition, was wholly oral, that is, by word of mouth, and no part of the purchase money was paid, or no part of the corn was delivered thereunder, then the plaintiff has failed to make out his case, and your verdict must be for the defendant. And there would be no such delivery of the corn to the defendant if the plaintiff simply stored his corn, or a part of it, in the defendant's crib, under an arrangement whereby it was to remain his property until such time as he saw fit to sell it to the defendant."

This request to charge correctly states the law relating to the statute of frauds, which was one of the questions in the case, and should have been submitted to the jury. It was not covered by any instruction given, and it was error to refuse it. (*First Nat. Bank of Madison v. Carson*, 30 Neb., 104.)

There are other errors assigned upon the giving and refusing of instructions, which need not be noticed.

The judgment of the district court is reversed, and the cause remanded for further proceedings, with leave to the plaintiff to amend his petition, if he so desires.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. THEODORE GALLIGHER,  
v. GEORGE HOLMES, JR.38 355  
d58 555

FILED NOVEMBER 21, 1893. No. 5043.

1. **Mandamus**: WRIT NOT PROPER FOR PURPOSE OF CORRECTING ERROR. *Mandamus* cannot be invoked for the purpose of correcting error committed by a court, or other tribunal exercising judicial functions.
2. ———: ———: REMEDY BY PETITION IN ERROR. The appropriate and proper remedy for reviewing a decision of a justice of the peace in granting a new trial on the ground of fraud, partiality, or undue means, is the ordinary one of a petition in error to the district court.

ERROR from the district court of Douglas county.  
Tried below before IRVINE, J.

*David Van Etten*, for plaintiff in error:

The motion to grant a new trial was set for hearing before the justice after the expiration of four days from the rendition of the verdict, and the justice was then without authority to entertain the motion. (Compiled Statutes, Code, sec. 983; *Vaughn v. O'Conner*, 12 Neb., 478.)

*Ambrose & Duffie*, contra:

The remedy sought is not the proper one. The remedy was by direct proceedings to correct the errors complained of. Injunction or *mandamus* will not lie. (*State v. Gillespie*, 9 Neb., 505; *Shelby v. Hoffman*, 7 O. St., 451; *State v. Kinkaid*, 23 Neb., 641; *Gould v. Loughran*, 19 Neb., 392.)

NORVAL, J.

Relator and plaintiff in error brought his action in the court below for a *mandamus* to require the respondent, a

justice of the peace of Douglas county, to issue an execution upon a judgment for costs, recovered before the respondent in a case wherein one Frank Jones was plaintiff, and the relator and one Elizabeth Galligher were defendants. An alternative writ was issued, and the respondent filed an answer thereto. The cause was heard on the alternative writ and answer, and the district court dismissed the action.

The record shows that the above mentioned case of *Jones v. Galligher and Galligher* was tried before the relator and a jury, and on the 14th day of September, 1891, the jury returned a verdict for the defendants. Thereupon, on said day, the justice rendered judgment upon the verdict, and that plaintiff pay the costs of the action. On the 17th day of the same month said plaintiff Jones filed a motion with the justice to set aside the verdict and judgment and for a new trial of the case on the ground, among others, that the verdict was rendered by reason of the prejudice of the jury against the plaintiff. Hearing on the motion was set for September 19th, and notice was duly served upon the defendants, on which date counsel for the respective parties appeared before the justice, and by consent the hearing was continued until September 26th. On said last mentioned date the motion was submitted to the justice, who took the same under advisement until September 29th, upon which date the motion was sustained, the verdict and judgment were set aside, and the cause set for trial on October 5, 1891. Prior to the last named date this application for a *mandamus* was made to the district court.

The contention of the plaintiff in error is that the respondent had no power or authority to vacate the judgment in question and grant a new trial; therefore his action in the premises is a nullity. Section 983 of the Civil Code confers jurisdiction upon justice courts to grant a new trial in cases where it is shown "that the verdict was obtained by

fraud, partiality, or undue means, at any time within four days after the entering of judgment." (*Cox v. Tyler*, 6 Neb., 297; *Templin v. Synder*, 6 Neb., 491.) As heretofore stated, one of the grounds in the motion on which the respondent assumed to act was the partiality of the jury, which is one of the causes enumerated in the section of the statute referred to above for granting a new trial by a justice of the peace.

But it is said the respondent had no authority to vacate the judgment, since the order granting a new trial was made more than four days after the return of the verdict and the entry of judgment thereon. *Vaughn v. O'Conner*, 12 Neb., 478, was tried in the county court, and the plaintiff obtained a verdict. Defendant immediately gave notice of a motion for a new trial, and within three days a motion to that effect was filed, under the provisions of section 983 of the Code of Civil Procedure, which motion was granted on the 8th day of March. This court, after quoting the above section of the statute, say: "The new trial is to be granted within four days, if at all. The authority of a justice of the peace or county judge to grant a new trial is derived wholly from the statute, and it must be exercised in the manner and within the time limited therein. (*Cox v. Tyler*, 6 Neb., 297; *Fox v. Meacham*, 6 Neb., 530.) The county court had no authority, therefore, on the 8th day of March, to set aside a verdict rendered on the 14th day of February." In the light of that decision it must be conceded that the respondent in this case erred in granting a new trial, and, in a proper proceeding brought for that purpose, his ruling would have to be overruled. It is, however, clear that relator has mistaken his remedy. The appropriate and proper remedy is the ordinary one of a petition in error to the district court. (*State v. Powell*, 10 Neb., 48.)

The case cited was an application for a *mandamus* to compel a justice of the peace to reinstate a judgment, where,

## Omaha Fire Ins. Co. v. Maxwell.

on the trial to a jury of the rights of property levied on by a constable, a verdict had been rendered in favor of the judgment creditors, which, on motion, the justice set aside on the ground of partiality and undue means. This court ruled that the alleged error in vacating the verdict and judgment could not be reviewed in a proceeding for *mandamus*. (See *Gould v. Loughran*, 19 Neb., 392.) It is well settled that *mandamus* cannot be resorted to for the purpose of correcting errors committed by a court or other tribunal exercising judicial functions. (*State v. Nemaha County*, 10 Neb., 32; *State v. Kinkaid*, 23 Neb., 641; *McGee v. State*, 32 Neb., 149.)

The judgment of the district court is right and is

AFFIRMED.

38	358
38	362
38	358
47	188

OMAHA FIRE INSURANCE COMPANY V. MAXWELL,  
SHARP & ROSS COMPANY.

FILED NOVEMBER 21, 1893. No. 5989.

1. **Motion to Dismiss Error Proceeding: TIME: NOTICE.**  
A motion to dismiss a petition in error on the ground that the record shows the order sought to be reviewed was entered by consent of parties, will not be entertained by this court, when notice of the motion has not been served prior to the expiration of the time fixed by rule 8 for serving briefs in the case.
2. **Orders Made by Consent of Parties: REVIEW.** A party cannot predicate error upon the overruling of a motion for a new trial by the district court, where such order was made in pursuance of the written stipulation of all the parties.
3. ———: ———. An order or judgment which is entered by agreement of parties, and not as the decision of the trial court, will not be reviewed by this court.

ERROR from the district court of Madison county.  
Tried below before POWERS, J.

*John R. Hays*, for plaintiff in error.

*Mapes & Licey* and *H. C. Brome*, contra.

NORVAL, J.

This action was instituted by defendant in error, a corporation, on a policy of insurance. A verdict was returned for the plaintiff, upon which a judgment was rendered, and on February 11, 1892, the insurance company brought the cause to this court for review by petition in error. Defendant in error has filed a motion to dismiss on the ground that the motion for a new trial in the court below was overruled, and final judgment was entered in the cause by consent of parties. This motion comes too late. Rule 8 of this court provides that "neither motions to dismiss, unless for want of prosecution, nor to strike a bill of exceptions, will be heard, unless notice thereof shall be served upon the opposite party or his attorneys, or the attorney who tried the cause for him in the trial court, at or before the expiration of the time for serving briefs in the case."

Rule 9 reads as follows: "In all cases brought into this court upon error or appeal, the plaintiff in error or appellant shall, at least twenty days prior to the week in which the case shall be entered for hearing, furnish to the opposite party, or to his attorney of record, a printed copy of his brief of points and authorities relied on; and within fifteen days thereafter the defendant in error, or appellee, shall furnish the plaintiff in error or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court and the others for the reporter, and the party bringing the case into this court shall hold the affirmative," etc.

This cause was entered upon the docket with cases from the ninth district, which were set for hearing October 25th. The motion to dismiss was not made until October 24th. Briefs of plaintiff in error on the merits were served and filed long prior to the time they were due by the rule of this court. The motion to dismiss in this case is based upon a matter appearing upon the face of the record, and no notice of the motion having been served prior to the expiration of the time stated in the rule above quoted for serving briefs, the motion to dismiss is therefore overruled.

The record shows that after the filing of the motion for a new trial in this cause in the court below, the parties entered into and filed in that court the following stipulation: "It is hereby stipulated and agreed by and between the plaintiff and the defendant that the motion for a new trial in the above entitled case be taken up by Hon. W. V. Allen, judge, at the June term of the district court of Madison county, Nebraska, and by him overruled."

It also appears that, in pursuance of the terms of the foregoing agreement, the court on the 6th day of June, 1892, overruled the defendant's motion for a new trial of the cause, and judgment was entered upon the verdict of the jury. The ruling or decision complained of was made at the request of the plaintiff in error, and to now permit it to assign the same for error would be a violation of the plainest principles of law. A party is not entitled to prosecute error upon the granting of an order or the rendition of a judgment when the same was made with his consent, or upon his own application. A judgment rendered by consent of all the parties to the suit will not be reviewed on error or appeal. (*Hughes v. Feeter*, 23 Ia., 547; *Chapin v. Perrin*, 46 Mich., 130; *Brick v. Brick*, 65 Mich., 230; *In re Pemberton*, 4 Atl. Rep. [N. J.], 770; *Pemberton v. Pemberton*, 7 Atl. Rep. [N. J.], 642; *Bailey v. Scott*, 47 N. W. Rep. [S. Dak.], 286; *Varn v. Varn*, 32 S. Car., 77; *Conniff v. Kahn*, 54 Cal., 283; *Jackson v. Brown*, 82 Cal.,

275; *Peterson v. Swan*, 119 N. Y., 662; *Lee v. Hassett*, 39 Mo. App., 67; *Herman v. Owen*, 42 Mo. App., 387.)

*Chapin v. Perrin*, 46 Mich., 130, was an appeal from a decree rendered in pursuance of a stipulation of the parties. Cooley, J., in the opinion says: "Appeals bring up for review some action of the court below which is complained of as erroneous. In this case there has been no such action. The chancery court has performed no judicial act whatever, except what is implied in permitting a consent order to be entered. But neither party can complain of a consent order, for the error in it, if there is any, is their own, and not the error of the court."

In the case at bar the plaintiff in error, by stipulating that its motion for a new trial should be overruled, was thereby placed in such a position as to preclude itself from taking advantage of the ruling, although erroneous. It cannot now be heard to say that the judgment was erroneous. In reaching this conclusion we have not overlooked, nor failed to give due weight to, the affidavit of counsel for plaintiff in error filed in resistance of the motion to dismiss. The affidavit states, in substance, that Judge Powers presided at the trial, and before the motion for a new trial was passed upon, his term of office expired; that Hon. W. V. Allen, who had been counsel for defendant in error in the trial of the cause, succeeded Judge Powers as judge of the ninth judicial district, and, as Judge Allen was disqualified to rule upon the motion for a new trial, the stipulation was entered into authorizing him to overrule the motion for the sole purpose, thereby the sooner getting the case into this court for decision, and it was so understood at the time by counsel for the respective parties. Doubtless counsel for plaintiff in error did not suppose the signing of the stipulation in question would prevent a review of the case in this court; yet, nevertheless, under the decisions already mentioned, such is the legal effect of the stipulation. It contains no provisions saving

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Rockford Ins. Co. v. Maxwell.

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the right to prosecute error. Had the parties not stipulated what the decision of the court should be upon the motion, but simply authorized Judge Allen to pass upon it, then we grant that the ruling might be assigned for error; but since the order was entered by consent, the error, if any, is waived. It follows that the judgment of the district court must be

AFFIRMED.

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ROCKFORD INSURANCE COMPANY V. MAXWELL, SHARP  
& ROSS COMPANY.

FILED NOVEMBER 21, 1893. No. 5990.

ERROR from the district court of Madison county. Tried below before POWERS, J.

*John R. Hays*, for plaintiff in error.

*Mapes & Licey* and *H. C. Brome*, contra.

NORVAL, J.

This case presents the same questions as in the case of *Omaha Fire Ins. Co. v. Maxwell, Sharp & Ross Co.*, 38 Neb., 358, decided herewith. For the reasons stated in the opinion filed in that case, the motion to dismiss the proceeding in error is overruled and the judgment of the district court is

AFFIRMED.

## CHARLES LUNDGREN V. JOHN ERIK ET AL.

FILED NOVEMBER 21, 1893. No. 4964.

**Motion to Vacate Order of Dismissal: SUFFICIENCY OF SHOWING: REVIEW: PRACTICE.** In the district court, on motion of defendants, and in absence of plaintiff and his attorney, the suit was dismissed for want of prosecution. On the same day, counsel for plaintiff, as soon as he learned of the order of dismissal, moved to set the same aside and reinstate the suit, supported by affidavit, which is uncontradicted, showing that he was not guilty of laches in failing to appear and prosecute the cause when called for trial, and that plaintiff had a meritorious case. *Held*, That the showing was sufficient to entitle plaintiff to have the judgment of dismissal vacated and the case reinstated.

ERROR from the district court of Douglas county.  
Tried below before IRVINE, J.

*C. P. Halligan*, for plaintiff in error, cited: *Eaton v. Hasty*, 6 Neb., 427; *Thraillkill v. Daily*, 16 Neb., 116; *Berggren v. Berggren*, 24 Neb., 764; *O'Dea v. Washington County*, 3 Neb., 122; *State v. Gaslin*, 25 Neb., 72; *Brusa v. Sandwich Mfg. Co.*, 28 Neb., 827.

*A. S. Ritchie, contra.*

NORVAL, J.

Plaintiff in error was plaintiff in the court below. When the cause was reached for trial, on motion of the defendants, the action was dismissed for want of prosecution. Subsequently, on the same day, plaintiff filed a motion to vacate the order of dismissal and to reinstate, which was denied; and to review said ruling the cause was brought to this court.

The bill of exceptions states that the following affidavit was filed and read in support of the motion to reinstate the case:

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Lundgren v. Erik.

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"STATE OF NEBRASKA, }  
COUNTY OF DOUGLAS. } ss.

"Charles P. Halligan, being first duly sworn, deposes and says that he is attorney for the plaintiff in the above entitled action; that said action has been pending for a long time, and that said plaintiff has, ever since the institution of said action, been ready and anxious to have said cause tried, and is now ready and anxious to have the same tried; and that, as affiant verily believes, said plaintiff has a good cause of action against said defendants.

"Affiant further says that at the time the order of dismissal was made herein affiant was engaged in the trial of the case of *Johnston v. Erickson* before his honor, Judge Davis.

"Affiant further says that he has not been negligent in watching said cause, but that at all times he has been ready, since said cause was put upon the call, to try the same, except when actually engaged in the trial of said cause of *Johnston v. Erickson* before Judge Davis.

"C. P. HALLIGAN.

"Subscribed in my presence and sworn to before me this 26th day of June, A. D. 1891.

"GUSTAVE ANDERSON,  
"Justice of the Peace."

Under the facts stated in the foregoing affidavit, and others disclosed by the record before us, we are of the opinion that the motion to vacate the judgment of dismissal, and to reinstate the action, should have been sustained. It appears from the affidavit that plaintiff has a good and meritorious cause of action. It is further disclosed that plaintiff was not guilty of such negligence, or laches, in failing to appear when the case was regularly called for trial and when the order of dismissal was made, as to preclude him from having the relief demanded. Plaintiff had employed Mr. Halligan to bring the suit and to look after and try the same for him. The cause stood upon the cal-

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Lundgren v. Erik.

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endar for trial on June 26th, and was the last of ten cases on the call for that day before the same judge. When it was regularly reached on said day, plaintiff's attorney was engaged in the trial of another suit before one of the other judges of said court; therefore he was unable to be present. Neither plaintiff nor his attorney had endeavored to hinder or delay the trial of this case, but they have at all times been ready and willing to have the same heard upon the merits.

It is important that progress be made with the calendar of cases; but it is of vastly more importance that justice be done, and that cases be disposed of on their substantial merits. We are aware that it is difficult to lay down a general rule for determining when an order dismissing an action on account of the failure of the plaintiff to appear should be vacated, and the cause reinstated, and we shall not now attempt to do so. Each case must necessarily be decided upon its own peculiar facts. Under the showing contained in the bill of exceptions, we are all agreed the court should have set the order of dismissal aside and reinstated the cause upon the docket.

It is proper to state that the transcript of the case prepared by the clerk of the district court contains a certified copy of the affidavit of plaintiff's attorney filed in support of the motion to reinstate, and which copy differs from the one incorporated in the bill of exceptions, in that it does not contain any allegation as to plaintiff having a meritorious cause of action. Of course such an allegation was necessary; and it is not improbable that the motion was overruled for want of a showing of merit; but, as a reviewing court, we must base our decision upon the evidence disclosed by the bill of exceptions.

The judgment of the district court is reversed, the judgment of dismissal vacated and set aside, and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

## STATE OF NEBRASKA V. WILLIAM HUGHES.

38	366
62	141

FILED NOVEMBER 21, 1893. No. 4981.

1. **Indictment and Information: UNLAWFUL SALE OF MORTGAGED PROPERTY.** In an indictment for selling or transferring mortgaged personal property, it is necessary to allege the name of the person or corporation to whom such sale or transfer was made.
2. ———: ———. It is not sufficient in such an indictment to allege that the sale was made without the consent of the mortgagee, naming him. To constitute the offense, the sale of the property must have been made by the mortgagor during the existence of the mortgage lien, without the written consent of the owner and holder of the debt secured by the mortgage, and the indictment must so charge.

EXCEPTIONS to the decision of the district court for Gage county, APPELGET, J., presiding. Filed by leave of the supreme court under the provisions of section 515 of the Criminal Code.

*Alfred Hazlett, County Attorney, for the state.*

*A. Hardy and Rickards & Prout, contra.*

NORVAL, J.

At the March term, 1891, of the district court of Gage county, the grand jury in and for said county returned into court an indictment charging the defendant with selling chattel mortgage property. The indictment, omitting the formal parts, alleges "that one William Hughes, late of the county aforesaid, on the 28th day of May, in the year of our Lord one thousand eight hundred and ninety, in the county of Gage and state of Nebraska, aforesaid, in due form of law did mortgage to W.J. Harris, Louis Werner, and Ebright the following personal property, to-wit:  
\* \* That afterwards, on, to-wit, the first day of Septem-

ber, 1890, in said county of Gage, and during the existence of the lien of said mortgage, said William Hughes, then and there being, unlawfully, fraudulently, and feloniously did sell, transfer, and dispose of a part of the said personal property described in said mortgage, to-wit, all of said oats and all of said millet; and the said William Hughes, then and there being, on, to-wit, the 15th day of November, 1890, in said county of Gage, and during the existence of the lien of said mortgage, did unlawfully, fraudulently, and feloniously sell, transfer, and dispose of a portion of said personal property, described in said mortgage, to-wit, about twenty-five bushels of corn, all of said sales, transfers, and disposals being without first procuring the consent of said W. J. Harris, Louis Werner, and Ebright, mortgagees, or either of said mortgagees; contrary to the form of the statute," etc.

On the trial the defendant, after the introduction of some testimony, objected to the reception of any further testimony in the case, on the ground that the indictment does not state facts sufficient to constitute a crime, which objection was sustained; and thereupon the court instructed the jury "that there is not sufficient evidence in this case to sustain a conviction. You will therefore find the defendant not guilty; that the introduction of the mortgage in controversy shows that there can be no offense under the laws of this state, before the mortgagees have been in some way injured by its breach." The jury returned a verdict of not guilty, and the defendant was discharged. The county attorney excepted to the decision of the district court, and he has brought the cause to this court under the provisions of section 515 of the Criminal Code, to settle the law.

This prosecution was brought under section 315 of the Consolidated Statutes, which declares "That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in

any manner dispose of the said personal property, or any part thereof, so mortgaged, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the debt secured by said mortgage to any such sale, transfer, or disposal, shall be deemed guilty of a felony, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars, or imprisoned in the penitentiary for a term not less than one year nor more than ten years, or both fine and imprisonment, at the discretion of the court."

Complaint is made in the brief of the county attorney to the last portion of the court's charge to the jury. Whether, in a prosecution under the above section, it is necessary for the state, in order to make out its case, to establish that the mortgagee has been injured by the sale and disposal of the mortgaged property, it is unnecessary to decide in this case, for, if the charge erroneously stated the law upon that question, it was error without prejudice to the state, unless the indictment charges an offense. But the indictment is fatally defective in at least two important particulars. It fails to allege to whom the sale, transfer, or disposal of the mortgaged property was made. The statute reads: "Sell, transfer, or in any manner dispose of said personal property, or any part thereof, so mortgaged, to any person or body corporate." In a prosecution for violation of the section under consideration it is necessary to aver in the information or indictment the name of the person or corporation to whom the sale or transfer of the property was made, and the same must be proved as alleged. (*State v. Ruhnke*, 27 Minn., 309; Maxwell, Criminal Procedure, 496, note 1.) Again, the indictment fails to allege that the sale, transfer, or disposal of the property was made by the defendant without the consent of the owner and holder of the debt secured by the mortgage, and for this reason no crime was stated. The indictment charges, in substance, that the mortgagees, or either of them, did not consent to

City of Lincoln v. Grant.

the sale. This was not sufficient. To constitute an offense the transfer or sale must be without the written consent of the owner and holder of the debt secured by the mortgage. It is nowhere stated in the indictment that the mortgagees, or either of them, at the time the sales or transfers were made, owned the debt for which the mortgage was given to secure. An indictment should charge explicitly all that is necessary to constitute the crime. It cannot be aided by intendments. (*Smith v. State*, 21 Neb., 552.) The indictment fails to negative the innocence of the defendant. For the reasons stated, the indictment fails to charge an offense, and the exceptions to the decision of the district court are overruled.

## EXCEPTIONS OVERRULED.

## CITY OF LINCOLN V. PATRICK J. GRANT.

FILED NOVEMBER 21, 1893. No. 5379.

1. **Municipal Corporations: CITIES OF THE FIRST CLASS: UNLIQUIDATED CLAIMS.** Although the right to recover for damage to private property is reserved by the constitution, it is within the power of the legislature to regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the power of the legislature in that respect is that the regulation must be reasonable, and provided by general laws of uniform application.
2. ———: ———: ———. The provision of section 36 of the charter of the city of Lincoln, that in order to maintain an action against said city for an unliquidated demand, the claimant shall, within three months from the time such right of action accrued, file with the city clerk a statement of the time, place, and circumstance of the injury or damage, is a reasonable exercise of the legislative powers.
3. ———: ———: ———. The filing of the required statement is in the nature of a condition precedent, and must be alleged and proved in order to maintain an action in such cases.

38	369
39	76
38	369
41	577
38	369
45	458
45	680
38	369
d52	644
38	369
56	770

ERROR from the district court of Lancaster county.  
Tried below before TIBBETS, J.

The opinion contains a statement of the case.

*N. C. Abbott, City Attorney, and Abbott, Selleck & Lane,*  
for plaintiff in error:

It was incumbent on defendant in error to prove that he had filed his claim in the office of the city clerk. (Comp. Stats. Neb., sec. 36, ch. 13a.)

The statute is valid. Such provisions are uniformly enforced in other states. (*Nichols v. Minneapolis*, 16 N. W. Rep. [Minn.], 410; *Clark v. City of Austin*, 38 N. W. Rep. [Minn.], 615; *Sheel v. City of Appleton*, 5 N. W. Rep. [Wis.], 27; *Vogel v. City of Antigo*, 51 N. W. Rep. [Wis.], 1008; *Hiner v. City of Fond du Lac*, 36 N. W. Rep. [Wis.], 632; *Crittenden v. City of Mt. Clemens*, 49 N. W. Rep. [Mich.], 144; *Mead v. City of Lansing*, 56 Mich., 601; *City of Detroit v. Michigan Paving Co.*, 38 Mich., 358; *Yolo County v. City of Sacramento*, 36 Cal., 193; *City of Atchison v. King*, 9 Kan., 550; *Reinig v. City of Buffalo*, 6 N. E. Rep. [N. Y.], 792; *Jones v. City of Minneapolis*, 31 Minn., 230; *Benware v. Town of Pine Valley*, 53 Wis., 527; *Maddox v. Randolph County*, 65 Ga., 216; *Marshall County v. Jackson County*, 36 Ala., 613; *May v. City of Boston*, 23 N. E. Rep. [Mass.], 220; *Greenleaf v. Norridgewock*, 19 Atl. Rep. [Me.], 91; *Low v. Windham*, 75 Me., 113.)

*Richard Cunningham, contra, cited: Foxworthy v. City of Hastings*, 23 Neb., 772.

Post, J.

This was an action by the defendant in error in the district court of Lancaster county against the plaintiff in error, the city of Lincoln. In the petition below it is al-

leged that the plaintiff therein is the owner of lots 14 and 15, in block 69, in said city; that in the year 1886 the city changed the grade of Ninth and M streets adjacent to said lots, by reason of which said streets were lowered from two to seven feet below the grade which had previously been established; that in the year 1889 the city, by its agents and servants, actually lowered said streets so as to conform to the grade so established in 1886, to the damage of the plaintiff in the sum of \$1,200. It is further alleged that in the month of February, 1890, the plaintiff presented to the city council a claim in writing, duly verified, for the sum of \$1,200 on account of the lowering of the streets above named adjacent to his said property, which is the amount of damage actually sustained by him, but that his said claim was wholly rejected and disallowed.

The city filed an answer in which it challenged the jurisdiction of the district court on the ground that the plaintiff's only remedy was by appeal from the order disallowing his claim. It admits that it caused Ninth and M streets to be graded, curbed, and paved in the year 1889, but denies that the plaintiff has been damaged thereby, and alleges that said improvement is of special benefit to his said property, which has increased in value by reason thereof \$2,000; and denies the other allegations of the petition.

A trial resulted in a verdict and judgment for the plaintiff below in the sum of \$500, whereupon the cause was removed to this court by petition in error.

The first proposition of the plaintiff in error is that, under the provisions of the charter of 1889 of the city, all claims, whether arising *ex contractu* or *ex delicto*, must be presented to the city council, and when disallowed, the remedy by appeal is exclusive. That proposition we will not consider at this time, since the judgment must be reversed on other grounds.

The second proposition upon which reliance is placed by the city is that the failure of the plaintiff below to file

with the city council a statement in writing showing the time, place, and circumstance of the damage complained of, etc., is fatal, and a complete defense to his action. Section 36 of the city's charter, as amended in 1889 (sec. 36, ch. 13a, Comp. Stats., 1889), concludes as follows: "And to maintain an action against said city for any unliquidated claim it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstance, and cause of the injury or damage complained of. No appeal bond shall be required of the city by any court in any case of appeal by said city."

On the part of the defendant in error it is contended that the provision above quoted is not mandatory; that it is applicable to the subject of costs only, and that the filing of the statement therein contemplated need not be alleged or proved in actions for damages against the city. In support of that contention he cites *Foxworthy v. Hastings*, 23 Neb., 772, in which it is said: "While it is proper to present the names of such witnesses to the city authorities in order that the validity of the claim may be investigated, yet it is believed that the failure to do so will not defeat a recovery, although it may affect the question of costs." It is true the act involved in that case contains substantially the same provision as the one now under consideration, but the question presented and decided was the validity of the provision requiring actions against the city to be brought within six months after the sustaining of the injury or damage complained of. That the observations with reference to the question here presented are mere *dicta*, and were intended as such, is clear, since it is stated in the opinion that the provision for the filing of the statement referred to was not necessary to a determination of that controversy. Regarding the question as an open one, we have examined it in the light of authority;

and our conclusion is that the filing of the statement contemplated by the charter of the city is in the nature of a condition precedent to the right to prosecute an action for damages, and is a material allegation in order to state a cause of action. The following may be cited in support of the view here stated, while we have in our examination observed no case in which a different rule is announced: *Susenguth v. Rantoul*, 48 Wis., 334; *Benware v. Pine Valley*, 53 Wis., 527; *Sheel v. Appleton*, 49 Wis., 125; *Nichols v. Minneapolis*, 30 Minn., 545; *Ray v. St. Paul*, 44 Minn., 340; *Low v. Windham*, 75 Me., 113; *Greenleaf v. Norridgwock*, 82 Me., 62; *Reining v. Buffalo*, 102 N. Y., 308; *May v. Boston*, 150 Mass., 517.

It is true the right to recover for damage to private property in like cases is reserved by the constitution, but there is no doubt that the legislature may regulate the remedy and prescribe the forms to be observed in order to enforce that right. The only limitation upon the legislative authority is that the regulation must be reasonable and provided by general laws of uniform operation.

Objection is made to the provision under consideration on the ground that it is an unreasonable restriction upon private rights, although there is no apparent ground for such an objection. In *Plum v. Fond du Lac*, 51 Wis., 393, the act requiring notice of the injury to be given within ninety days thereafter became a law twelve days after the injury was received, yet it was held applicable, and that the action would not lie, it not appearing that notice had been given. It was said that although the plaintiff did not have the full statutory time within which to give notice, the ninety days allowed therefor did not expire until long after the act had become a law; hence he could have complied with all of the conditions imposed thereby. It is said in the opinion that the act relates to the remedy merely and "should be upheld and made operative in all cases where it would not affect the subject-mat-

ter of the action, or interfere with vested rights either in suits or property;" while in *Greenleaf v. Norridgwock*, *supra*, the statute required notice to be given within fourteen days after the injury was received. It is said by Dixon, C. J., in *Von Baumbach v. Bade*, 9 Wis., 577\*: "All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." And in *State v. Hundhausen*, 24 Wis., 199, it was held that an act requiring the holder of a tax certificate to give notice sixty days prior to his application for a deed was valid as to sales made before its passage, provided there was reasonable time after the law took effect within which to comply with its requirements. In the opinion it is said by Paine, J.: "The legislature, upon grounds of public policy, and for the purpose of better protecting the interests of those having rights of redemption, required the holder of the certificate to notify the person in possession of the land, if any, of his intention to apply for the deed. This does not interfere at all with his rights under the contract. They are in nowise diminished. The rights of the owner of the land are in nowise enlarged. It is merely a new formality imposed upon grounds of public policy, and by observing which he secures all his rights unimpaired. This we do not think can be held to impair the obligation of the contract."

In our opinion the provision under consideration is a reasonable exercise of the legislative power, and consistent with the soundest public policy. It follows that the judgment should be reversed and the case remanded for further proceedings in the district court.

REVERSED AND REMANDED.

## MATILDA DREESSEN V. STATE OF NEBRASKA.

FILED NOVEMBER 21, 1893. No. 5156.

1. **Homicide: SUFFICIENCY OF EVIDENCE.** In order to sustain a conviction for a felony on purely circumstantial evidence the circumstances pointing to the guilt of the accused must be of so conclusive a character as to exclude every other reasonable hypothesis.
2. ———: ———. It is not sufficient that the circumstances when considered together create a probability, although a strong one, of the guilt of the accused.
3. ———: ———. To sustain a conviction for murder or manslaughter the *corpus delicti* must be established beyond a reasonable doubt; and where the circumstances relied on to prove that death was caused by the criminal act of a person other than the deceased are consistent with the theory that death was produced by natural causes, there is failure of proof.
4. ———: ———. Evidence examined, and *held* not sufficient to exclude the hypothesis that death was produced by natural causes.

ERROR to the district court for Cherry county. Tried below before CRITES, J.

*J. Wesley Tucker*, for plaintiff in error.

*George H. Hastings, Attorney General*, for the state.

Post, J.

This was a prosecution against the plaintiff in error and her husband, George Dreessen, in the district court of Cherry county, for the murder of their son, Theodore Dreessen. A trial was had resulting in the acquittal of George Dreessen and a conviction of the plaintiff in error of the crime of manslaughter, which she now seeks to reverse by a petition in error addressed to this court. The information, omitting formal and introductory parts thereof, is as follows:

“And that they, the said George Dreessen and Matilda

38	375
43	394
38	375
51	686
38	375
56	498
38	375
61	236

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Dreessen v. State.

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Dreessen, then and there unlawfully, purposely, feloniously, and of their deliberate and premeditated malice, did strike, beat, and kick the said Theodore Dreessen with their hands and feet in and upon the head, breast, back, neck, belly, and sides, and other parts of him, the said Theodore Dreessen, and did then and there unlawfully, purposely, and of their deliberate and premeditated malice, cast and throw the said Theodore Dreessen down into and upon the floor and pound with great force and violence, with the intent aforesaid, thereby then and there giving to the said Theodore Dreessen then and there, as well by the beating, striking and kicking of him, the said Theodore Dreessen, in manner and form as aforesaid, as by the casting and throwing of him, the said Theodore Dreessen, down as aforesaid, one mortal wound and fracture in and upon the neck of him, the said Theodore Dreessen, to-wit, one fracture and separation of the fourth and fifth cervical vertebræ, of which said mortal wound and fracture he, the said Theodore Dreessen, then and there died."

In view of the conclusion reached with respect to the sufficiency of the evidence to sustain the conviction, it is deemed unnecessary to examine in detail the several questions discussed by counsel. It is sufficient to say that we find no error in the rulings of the district court during the trial, but we think the verdict should have been set aside on the ground that there was a failure of proof of the essential allegation of the information. The facts disclosed by the evidence of the state are substantially as follows: The plaintiff in error and her husband, George Dreessen, with their family of several children, resided at the time of the alleged killing on a farm, "or ranch," as it is described by the witnesses, in Cherry county. They are evidently foreigners, apparently ignorant, and, judged by their treatment of the deceased, wanting in the regard and affection commonly felt by parents for their children. So far as the record discloses, the other children, including an elder

son and daughter, were humanely treated, but Theodore, the deceased, who was twelve years of age at the time of his death, was treated with unusual severity, and even cruelty, by both parents, and especially by the accused, his mother. It is in evidence that he was seldom permitted to eat with the family and was required to sleep during the severest weather in a shed addition to the family dwelling, in a box filled with straw; and his clothing was of the scantiest kind. According to the testimony of some of the witnesses, he was never known to have had a hat or other covering for his head, and is shown to have been the drudge of the family. On one occasion in the month of July, 1889, the deceased came into the house with some fuel, when his mother struck him a blow upon the head which felled him to the floor; at another time she kicked him so violently as to knock him down; and at other times she is shown to have slapped him in the face and on the head while he was engaged in carrying two buckets of water. At the time of his death both of his ears were deformed, which was caused, according to the contention of the state, by freezing, on account of unnecessary exposure. On the 30th day of December, Mr. Corbett, who resides two miles distant, was sent for by the father, but arrived after the death of the deceased. At that time the body, which was still warm, was on a bed in the main part of the house, covered with a feather bed and blanket, and between the legs and at the feet were jugs of water. Referring to the condition of the body at that time the witness testified:

Q. Did you pay any attention to his neck when he was moved?

A. Why, Mr. Dreessen took the pillow out from under his head when I was crossing his hands. I noticed his head went down.

Q. What do you mean by his head went down?

A. They were spreading him out. Mr. Dreessen took the

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pillow out from under his head, and I noticed that his head dropped rather quick. I think—I recollect he had a——

Q. Whereabouts did you notice the drop in his head,—in the neck?

A. Yes, sir.

Q. Can you tell the jury what part of the neck the drop was?

A. No, sir.

Q. You noticed it drop very quick.

A. Yes, sir.

Q. Describe it to the jury. Can you by motion?

A. I don't know that I could. It went down something like that. (Indicating.)

Q. That was when you moved his legs down a little?

A. No, sir; that was after we straightened his legs. His father was at the head mostly.

Q. Did you notice the condition of his neck and face?

A. It was swollen.

Q. Did you notice anything about the head? Was it covered or uncovered?

A. He had a towel tied around the head to keep the jaws up.

Q. Tell the jury what it was.

Witness: What the cloth was?

Harrington: Yes.

A. I couldn't say what it was. I don't know whether it was a towel or a piece of cotton cloth.

Q. Can you tell the jury about how it was tied on, Mr. Corbett?

A. Drawn up here and tied on the back of his head.

\* \* \* \* \*

Q. Did you notice his body and face and head?

A. Yes, sir; some. I didn't see his body; that is, his extremity,—his limbs.

Q. Tell the jury anything you noticed about them.

A. I noticed he had some bruises on his face and hands.

Q. Describe these bruises, one by one, now.

A. He had a bruise across his nose, and he had one on his leg. I don't know which leg it was, but there were three or four on his face.

Q. What color had they?

A. They had a scab on them, probably three or four days old, possibly older. I didn't see any fresh scabs on him at all.

Q. Probably three or four days old, or something more, in your opinion?

A. Yes, sir.

Q. Did you notice his hands?

A. Yes, sir.

Q. Well, describe them.

A. He had some bruises on his hands and fingers that looked a good deal like the bruises on his face.

Q. What was their appearance? Were they small or considerable size?

A. They appeared to be bruises where he had struck himself or had been struck by some instrument, as a boy would very often have on his hands.

Q. Well, now, how about the face?

A. Well, as I stated before, he had some bruises on his face. He had one across the bridge of his nose about a half an inch square.

Q. About half an inch square?

A. I should judge it was.

On cross-examination the same witness testifies:

Q. There was nothing unnatural about that, was there—about his head dropping?

A. It arrested my attention at the time, and I concluded that his neck being so much smaller than his head, it would naturally drop quick.

Q. A dead body, warm like that, his head naturally would drop down, wouldn't it, if you take anything out from under it?

A. Be likely.

Q. You didn't observe anything about that head dropping or reeling around, anything more than would be common while the body was warm, did you?

A. No, sir; I think not.

Q. Mr. Corbett, you said in fixing this child, in straightening him out, his neck had swollen?

A. Yes, sir.

Q. Where was the swelling?

A. Around the neck, around his throat, and, as far as I saw, on his neck, and extended up to his cheek bones.

Q. The swelling was here and on the sides, and extended up to the cheek bones?

A. Yes, sir.

Q. Did you look on the back part?

A. No, sir.

Q. Did you see any bruises or purple ring around his neck?

A. No, sir.

Q. Nothing of the kind?

A. No, sir.

Mr. Zeller, another neighbor, saw the body the following morning and noticed the swollen condition of the neck. He also assisted to put the body in the coffin two days later, at which time it was rigid, but observed nothing peculiar about the neck or head, except the swelling above mentioned.

Some three months after the body was buried it was exhumed and carried twenty-five miles in a farm wagon, when it was removed from the coffin and an autopsy held under the direction of Dr. Holsclaw, one of the witnesses for the state. This witness testifies that he found on the body numerous scars, particularly on the back, face, and hands, extravasation of blood in the muscles of the neck, and a dislocation of the neck between the fourth and fifth cervical vertebræ; and states, as his opinion, that death was

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caused by such dislocation. He states that decomposition had set in at the time of the examination; that the skin seemed to have suffered from decay, and the body was very offensive. He also testifies as follows :

Q. What, in your judgment, was the cause of death?

A. In my judgment the cause of death was the dislocation of those vertebræ.

Q. Would the moving of the body in the coffin produce the dislocation of those vertebræ.

A. Yes, sir; it is possible.

And on cross-examination he testifies as follows :

Q. You said in your judgment the dislocation of those joints was caused by some violence?

A. Yes, sir.

Q. Might it not have been done in some other way?

A. It is possible hauling the body all that distance. It is possible that it might have occurred after death.

Q. Taking a body in a decomposed condition and such a condition as this body was?

A. Yes, sir.

Q. Hauling it over that country, rough as it was, is it not possible?

A. I will say it is possible. I would not say it is probable.

Q. Such a thing could be done—might be done?

A. Yes, sir.

George Dreessen, the father, testifies that the deceased was taken sick three days previous to his death with a swelling on the side of his neck; that the first day it was not painful, but that he was advised by the witness to remain in bed. The next day he again advised the deceased to stay in bed, which the latter did for a part of the time, but retired for the night without taking any nourishment. The next morning the witness went to the bed of the deceased, who, in response to an inquiry as to his condition, said he felt better, and soon afterward arose and dressed, and was

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engaged as usual during the day attending to the fire and bringing water from the pump, but complaining of pain in his neck, and retired before supper. That evening the witness carried food to him after he had retired, but did not observe whether he ate of it or not. The witness' version of what transpired the next day is best shown by his own language: "Well, the next morning when I got up, I went into where we sleep. I waken first Christian, and I waken Mrs. Dreessen, and I waken Margaret. Then I built the fire, and after I built the fire I went to his bed, and when I came to his bed I said, 'Theodore.' He, perhaps like all the boys, you had to call him three or four times; but he made a move, and after I called him three or four times he opened his eyes and kind of stretched himself, and he turned over this way. He laid on his side, and he turned over this way. Well, I said, 'Theodore, are you awake?' Well, he didn't say anything, and, of course, I thought that because he opened his eyes and turned over, I went out into the kitchen again; and I went to make the breakfast and help Mrs. Dreessen; and Christian went out and done the outside work; and after breakfast was ready I says, 'Is Theodore up yet?' and they says, 'nobody has seen him.' Well, I went to his bed then, and he laid just the way he turned over. He laid on his side and turned over this way; and I took my hand and touched his forehead, and his forehead was cold; and I went into the house and I says, 'I believe Theodore is seriously sick,' and I says to Mrs. Dreessen and Margaret, and I and Mrs. Dreessen went up to his bed, and then I took the cover off. He was covered up then. He had three blankets to cover up with, and a big wagon sheet, twelve feet wide and sixteen feet long; then we lay him on top of these blankets, and after I had done that I felt under that. I seen that the skin of his body was cold all over. I felt down his limbs, and after that I placed this cover back, and we carried out some more heavy blankets laid in bed with him, and I

says, 'Christian, you had better eat, and saddle the pony,' and Ayers down there, I think he is kind of a doctor; 'and you had better go down to Ayers and ask him if he won't be so kind to come; Theodore was sick; he was cold where his skin was;' and he eat a bite and took the pony and went away to Ayers, and I says, 'Christian, we are running back and forth, and we keep the door open and every once in a while,' I says, 'we had better take him upstairs;' and we take the blankets hold of here by the feet, and I at the head, and we take him upstairs, and Mrs. Dreessen came up, and we laid him there in the bed, and I says, 'you had better get some warm water and jugs of hot water, and we will lay them, one at his head and one at his feet; and we will warm some blankets and wrap them around him;' and he laid there, and I staid with him part of the time, and Mrs. Dreessen warmed blankets and we kept warm blankets around him for quite a while, until we look out of the window. The boy had to come back from the southwest way, that was the way towards Ayers. I looked down and the boy didn't come back, and nobody was coming. At last I see the boy coming across lots in the valley, perhaps eighty rods away. This valley is about half a mile away. Margaret, my daughter, was upstairs with me tending the boy, and I went down stairs to meet Christian coming back from Ayers; and I says to Margaret to see to Theodore, and I went down stairs, and the boy don't come to the house; and I says, 'where is Ayers?' and he says, 'Ayers don't have time to come, but he gave me a bottle of medicine.' It was a patent medicine. I told him if Ayers couldn't come to stop at Mr. Corbett's to request Mr. and Mrs. Corbett to come over; and I says, 'what did Mr. Corbett say?' Well, the boy answered me, Mr. Corbett didn't know anything about sickness, and I says, 'you just start back as quick as possible and tell Mr. Corbett he has to come.' He started off on horseback on the run and I went back in the house, and that time I got in the house

Margaret came down stairs and says, 'papa, Theodore got blisters before his mouth,' and I run upstairs. I listened with my ears this way a little while, and his breath was gone."

Q. Who is Margaret that you speak of?

A. That is my daughter.

Q. Where had she been?

A. Upstairs with Theodore.

Q. How came she to be there?

A. I left her there.

Q. What directions did you give her?

A. To stay with Theodore there while I go down to meet Christian.

Q. And she come down running, telling you that something was wrong with his mouth?

A. Yes, sir; some blisters was running out of his mouth.

Q. What condition did you find him in?

A. He was dead.

Q. About his mouth, how was that?

A. There was some matter and blood mixed running out of his mouth; and when I got up I put my hand under his neck and cheek to rest him up.

Q. That was the night before?

A. No; that morning when he died.

Q. What time was it in the morning when he died?

A. We have no clock running at that time. I judge it must have been between 12 and 1 o'clock. It might have been 1 o'clock.

His explanation of the scar on the nose of the deceased is that two or three months previous, while the latter was assisting to clean the room in which he slept, he was struck by a hoe which fell from overhead and inflicted a wound, which had not healed. His explanation of the other scars and sores upon the body is that they were caused by disease of the skin. He admits that the deceased was scantily and sometimes insufficiently clad, but says he was unable to

better provide for him, and that, taking into consideration the services required of him, he was as well provided for as the other children. He is in the main corroborated by the plaintiff in error, and also by Margaret, the daughter to whom he refers. The last named witness, after testifying that she was with her brother when he died, proceeds:

Q. What direction did your father give you just before he did die?

A. You mean what he told me to do?

Q. Yes.

A. He told me to warm blankets and see to him.

Q. To see to him?

A. Yes, sir.

Q. Where did your father go just then?

A. He was up there too.

Q. Did he not go away from there and leave you there alone?

A. Yes; when they sent Christian to Ayres he come back.

Q. Then when Christian returned from some place, what did your father do or say?

A. He was going out to see if that man was come.

Q. What did he tell you when he started out?

A. He told me to stay by there?

Q. To do what?

A. He didn't tell me to do anything.

Q. Just to stay in the room with Theodore?

A. Yes, sir.

Q. Was Theodore living at that time?

A. Yes, sir.

Q. Now, tell those men there whether, at the time your father started down to meet your brother Christian, and left that room in which Theodore was—now you tell them whether or not Theodore was living.

A. Yes, sir.

Q. He was alive?

A. Yes, sir.

Q. How long was it until your father came back again?

A. It was about a few minutes.

Q. How many, ten or twelve?

A. No, I don't think. I guess five or six.

A. What caused him to go back?

A. I told him Theodore died.

Q. You come and told him your brother Theodore had died and he run back; is that right?

A. Yes, sir.

Q. Was you there during that day?

A. At home, I was all day.

Q. Do you remember when Theodore was brought out from the sod building and put in the bed upstairs?

A. Yes, I remember that.

Q. Now, at that time was he dead or alive?

A. He was alive.

Q. Did you see your father and mother on that day? Was you up in the room pretty nearly all the time?

A. Yes, sir.

Q. Did you see them on that day beat, kick, and hit Theodore on the head, and on the arms, and on his back and on his belly, and take him up and throw him on the floor and on the ground?

A. No.

Q. Did they do such a thing that day?

A. No.

Q. What time in the morning did they bring him up from that sod building?

A. It was before breakfast.

Q. What time was breakfast? Seven or eight o'clock?

A. I guess so.

Q. Was Theodore ever down from upstairs until after he was dead, after he had been taken up that morning? From the time that Theodore was taken up on the morning that he died, was he down stairs until after he died?

A. No.

For the purpose of impeaching this witness the state produced the sheriff, who testified that she had stated on her examination before him, while conducting an inquest as acting coroner, that she did not see the deceased upstairs the day of his death until after her father had gone away.

Mr. Marsh testifies that he dressed the body of the deceased before it was entirely cold, and afterwards assisted in placing it in the coffin; that the left side of the neck was swollen and discolored, but he did not observe that it was discolored elsewhere, nor was there anything peculiar about the neck or head. An attempt was made to impeach this witness, which was not entirely successful, in view of the fact that as to all material facts he is strongly corroborated by the state's witnesses, Corbett and Zeller.

In determining the effect of the foregoing evidence it should be borne in mind that the information contains a specific charge of murder, as it is therein alleged that death was caused by the dislocation of cervical vertebræ, or, rejecting the technical terms, by the breaking of the neck of the deceased. In the brief of the state it is said: "No testimony was offered at the trial directly bearing upon the matter of the injury to the neck. The conclusion as to that matter must be drawn from the facts and circumstances surrounding the case." And we may add that the only evidence tending to prove that death was produced by the alleged fracture is the testimony of Dr. Holsclaw. It may be admitted that his testimony is sufficient to create a strong probability of the correctness of the theory of the state; but it is certainly not of that convincing character which may be said to exclude every other hypothesis, and which is required to sustain a conviction upon purely circumstantial evidence. (See *Casey v. State*, 20 Neb., 138, and authorities cited.) Assuming that the witness discovered a dislocation of the bones of the neck, the theory that it may have been caused by the removal of the body in a wagon twenty-five miles, when so decomposed as to be dis-

colored and exceedingly offensive, is, to say the least, a reasonable one. If we reject all of the evidence for the accused, still his conclusion that the discolored condition of the neck was produced by extravasation of blood before death is insufficient to exclude the theory that it was produced by natural causes; and that theory is strongly supported by the fact that the body remained in the house of the accused three days after death, and was during that time inspected by at least three of the neighbors, who failed to note any circumstance tending to sustain the contention of the state. The claim of the accused is that the appearance of the neck of the deceased was caused by inflammation before death, which interfered with the circulation and produced the swelling and discoloration of the skin. That contention is sustained by the testimony of Corbett and Marsh, who observed the swollen condition of the neck and extending up to the cheek bone while the body was still warm, and also by Zeller, who observed the same thing after *rigor mortis* had set in. No attempt was made by the state to explain that condition by showing that it occurred after death or that it might have been caused by dislocation of the neck.

We are satisfied, after a careful examination of the entire record, that the state has failed to establish the *corpus delicti*, and that the judgment of the district court should be reversed. It must be confessed that the conclusion reached upon the reading of the record for the first time was that the verdict of manslaughter was fully justified by the evidence, on the ground that the death of the deceased boy was the proximate result of long continued neglect, deprivation, and exposure by the accused, which is barely outlined in the statement given above, and in character so unlike that of a mother as to almost challenge belief. Had the charge been manslaughter, and in the form contemplated by statute (Criminal Code, sec. 425), it is probable that the judgment might be sustained. It is apparent,

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Dixon County v. Beardshear.

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however, from a careful reading of the information, that evidence of cruelty toward the deceased was received for the purpose of proving malice only, and is therefore immaterial, except so far as it tends to establish the charge of killing by the particular means alleged. For the reason that there is a fatal variance between the proofs and the information the judgment of conviction is

REVERSED.

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### DIXON COUNTY V. HUGH BEARDSHEAR.

FILED NOVEMBER 21, 1893. No. 5323.

88	389
58	43
38	389
62	543

**Voluntary Payment of Illegal Taxes: RECOVERY.** Where one pays an illegal demand for taxes with full knowledge of the facts which render such demand illegal, without any urgent necessity therefor, such as the threatened immediate seizure or sale of his property, such payment will be deemed voluntary and cannot be recovered in an action at law.

**ERROR** from the district court of Dixon county. Tried below before NORRIS, J.

*J. J. McCarthy*, for plaintiff in error.

*A. G. Kingsbury*, contra.

POST, J.

The defendant in error recovered judgment against Dixon county, in the district court for said county, on the 24th day of November, 1891, for the sum of \$140.18 and costs, which we are asked to reverse for reasons which will be hereafter noticed.

In the petition of the plaintiff below it is alleged that he was, on the 2d day of December, 1885, the owner of eighty

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Dixon County v. Beardshear.

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acres of land in said county, which is fully described, and had paid and satisfied all taxes previously assessed against the same; that on the day last named he learned that his said land had been sold for taxes claimed to be delinquent for previous years, and offered to redeem the same from such sale, when he was informed by the county treasurer that one forty-acre tract thereof only had been sold, whereupon he paid to said treasurer the sum of \$8.77 to redeem said land from such pretended sale; that on the 4th day of January, 1886, the said treasurer, in fraud of the rights of the plaintiff, executed and delivered to one Jones a deed for all of said land, including the forty acres previously redeemed by him; that on the 24th day of August, 1886, in order to remove the cloud upon his title by reason of the aforesaid treasurer's deed, he was compelled to, and did, pay to said Jones, the grantee named therein, the sum of \$67, and on the 12th day of March, 1887, he was compelled to bring an action against said Jones in the district court of the defendant county to remove said cloud from his title, in which it was found that he had fully paid all taxes for the years named in the said deed, and a decree entered in accordance with the proofs of his petition, except that he was taxed with the costs of said action, amounting to \$3.35, which he has paid in full; and that in addition thereto he was compelled to pay the sum of \$15 as attorney's fees. It is further alleged "that on the 29th day of December, 1891, he paid to the treasurer of said county for said defendant a personal tax for that year amounting to \$1.90 when paid; that he had before that time paid the said tax to the treasurer of said county, but the treasurer thereof illegally and wrongfully claimed that said tax had not been paid and compelled him to pay the same a second time, as before said." He asks judgment for the amount of the above payments, with interest. His claim more fully appears from the following statement attached to the petition:

## Dixon County v. Beardshear.

THE COUNTY OF DIXON,

In account with H. BEARDSHEAR, Dr.

December 2, 1885, paid county treasurer for redemption certificate.....	\$8 77
Interest to July 12, 1889.....	3 17
August 24, 1886, give H. B. Dewitt, for J. W. Jones' tax title.....	67 00
Interest to July 12, 1889.....	19 39
March 12, 1887, paid docket fee, \$2; March 19, sheriff's fee, 85 cents .....	2 85
Interest to July 12, 1889.....	66
April 4, 1888, paid attorney fee .....	15 00
Interest to July 12, 1889.....	1 91
December 5, 1888, paid for copy of district court decision .....	50
December 29, 1881, paid personal property tax that I had paid the same year .....	1 90
Interest to July 12, 1889.....	1 33
Total .....	\$122 58

To the petition a demurrer was interposed and overruled; to which ruling the county excepted and refused to plead further, whereupon judgment was entered for the plaintiff therein for the full amount claimed. The ground of the demurrer is that the payments alleged were voluntary and made without threat of seizure or sale of the property of the defendant in error to satisfy the taxes in question. That position of the county is certainly in accord with decisions in this state. (See *Foster v. Pierce County*, 15 Neb., 48; *Welton v. Merrick County*, 16 Neb., 83; *Baker v. City of Fairbury*, 33 Neb., 674.) And we understand the rulings of this court to be in harmony with the great majority of cases in the state and federal courts. For instance, in *Union P. R. Co. v. Dodge County*, 98 U. S., 541, which involved a construction of the revenue law of this state, Chief Justice Waite observes that the law is correctly stated in the following quotations from *Wabaunsee County*

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Wagner v. Steffin.

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*v. Walker*, 8 Kan., 431: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." (See also *Ligonier v. Ackerman*, 46 Ind., 552; *Morris v. Mayor*, 5 Gill [Md.], 244; *Goddard v. Seymour*, 30 Conn., 394; *Garrigan v. Knight*, 47 Ia., 525; *Powell v. St. Croix County*, 46 Wis., 210.) The money sued for having been voluntarily paid, within the meaning of the authorities cited, it follows that it cannot be recovered from the county, and that the judgment of the district court should be

REVERSED.

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JOHN P. WAGNER V. WILLIAM STEFFIN ET AL.

FILED NOVEMBER 21, 1893. No. 5039.

1. **Sale: LIEN OF UNRECORDED CHATTEL MORTGAGE: NOTICE.**  
One who purchases personal property with knowledge of a prior, unrecorded mortgage thereon, takes subject to the lien created by such mortgage.
2. **Evidence** examined, and *held* to sustain the finding that the plaintiff, who claims under a bill of sale of personal property, had actual notice of a prior, unrecorded mortgage thereon.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

*Griggs, Rinaker & Bibb*, for plaintiff in error.

*George A. Murphy*, contra.

38	392
48	858

38	393
57	487

Post, J.

The controversy in this case involves the proceeds of a crop of corn raised in the year 1888 by Eckel, a tenant of one Charles Stoll, on a farm owned by the latter in Gage county. The plaintiff claims under a bill of sale executed by Eckel October 30, 1888, and filed for record November 10, following, while the defendants rely on the title of Stoll through an unrecorded written lease executed by the latter and Eckel May 15, 1888, in which it is provided that he, Stoll, shall have a lien on all crops grown on said premises to secure the stipulated rental, viz., \$250, on or before December 1, 1888, with power "to enforce the same as though he had a chattel mortgage with power of sale." Subsequent to the execution of the mortgage above described Eckel gathered the corn and delivered it to the defendants, with the consent of the plaintiff. After the delivery of the corn payment therefor was demanded by both the plaintiff and Stoll. Defendants elected to pay the money to Stoll on the ground that the latter was entitled to priority by virtue of his contract with Eckel, and accordingly refused to account to the plaintiff.

The first contention of the plaintiff is that he is entitled to priority as against the unrecorded lien of Stoll without regard to the question of notice. In that view we cannot concur. Prior decisions of this court have been uniformly to the effect that the provision relied upon (sec. 14, ch. 32, Comp. Stats.) does not apply where the party seeking its protection is shown to have purchased with actual notice of a prior unrecorded mortgage. (See *Conchman v. Wright*, 8 Neb., 1; *Gillespie v. Brown*, 16 Neb., 461; *Earle v. Burch*, 21 Neb., 702; *Railsback v. Patton*, 34 Neb., 490.) As said in *Gillespie v. Brown*, the provision for the filing of a chattel mortgage was designed to give notice to the world of the liens thus created, together with the amount, terms, and conditions thereof, and not for the protection of

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Schrider v. Tighe.

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purchasers who took with actual notice of all that the record would impart.

The only other question is the sufficiency of the evidence to show actual notice by plaintiff of Stoll's lien. There is a sharp conflict in the proof on that point. The agent for Mr. Stoll testifies positively that he personally notified plaintiff of the prior lien on the corn, while the latter as positively denies the notice. That issue was fairly submitted to the jury, and its finding is conclusive upon us. The judgment of the district court is

AFFIRMED.

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EMIL SCHRIDER V. WILLIAM TIGHE, SHERIFF.

FILED NOVEMBER 21, 1893. No. 5299.

**Fraudulent Conveyances: CHATTEL MORTGAGES: QUESTION FOR JURY.** The sole question presented in this case is, whether or not, as against existing creditors, a chattel mortgage made by a judgment defendant to plaintiff in error was fraudulent. The verdict of the jury, supported by competent evidence, is conclusive of that question as one of fact.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

The opinion contains a statement of the case.

*H. D. Travis*, for plaintiff in error:

Though a chattel mortgage, absolute in form and given for a definite sum as being due from the mortgagor, was in fact given only to indemnify the mortgagee against liability as joint maker with the mortgagor on certain notes, yet this would not invalidate the mortgage, if in fact a *bona fide*

liability existed upon such notes. (*Warren v. His Creditors*, 28 Pac. Rep. [Wash.], 257.)

The evidence of fraud given upon the trial cannot be taken to affect or impair the title of the grantee, Schrider. (*Sloan v. Coburn*, 26 Neb., 609; *Williams v. Eikenberry*, 25 Neb., 721.)

A pre-existing debt already due is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as a new consideration. (*Turner v. Killian*, 12 Neb., 580.)

There is no presumption in this case that there was no consideration for the mortgage. (*Forbes v. McCoy*, 15 Neb., 632; *Grimes v. Sherman*, 25 Neb., 843.)

*John A. Davies, contra:*

Fraud in such cases is a question of fact for the jury, and its verdict will not be disturbed unless clearly wrong. (Sec. 1802, Con. Stats.; *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb., 537, and cases cited.)

RYAN, C.

All essential facts and the sole question involved in this case are stated in the brief of plaintiff in error in the following language: "This is an action in replevin brought by Emil Schrider to obtain the possession of a quantity of ice, upon which he held a subsisting mortgage at the time the property was replevied, which mortgage was dated the 16th day of May, 1891, and filed in the county clerk's office on the 20th day of May, 1891. This mortgage was given by Charles F. Grothe and Etta S. Grothe to secure two notes to the First National Bank of Weeping Water; one for \$225, another for \$250; the one payable June 26, 1891, and the other payable July 24, 1891, and to secure the sum of \$15 due said Schrider from the Grothes. Mr. Schrider had signed the aforesaid notes as surety to the bank, and at the time of the trial of this case in the dis-

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strict court had paid both of these notes. The jury found in favor of the sheriff, the defendant, but found the value of the property to be only \$100, thus finding that the mortgage was void. There is only one proposition in this case, that is, was the mortgage executed by Etta S. Grothe and Charles F. Grothe on the 16th day of May, 1891, covering the ice in question and delivered to Emil Schrider, a valid mortgage?" Consistently with the above statement, no question, other than as stated, is urged in this court by the plaintiff in error.

Section 20, chapter 32, Compiled Statutes, provides that "the question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law," etc. The existence of facts showing a fraudulent intent in respect of conveyances alleged to be fraudulent must be determined by the jury. (*Fitzgerald v. Meyer*, 25 Neb., 77; *Connelly v. Edgerton*, 22 Neb., 82; *Davis v. Scott*, 22 Neb., 154; *Sonnenschein v. Bartels*, 37 Neb., 592, filed this term.) The verdict of the jury in this case, therefore, settles as a fact the only controversy in respect of which argument has been made; and the evidence, upon examination, being found ample to justify such verdict, the judgment of the district court is

AFFIRMED.

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38	396
42	701
38	396
44	820

HIRAM A. WATERMAN ET AL., APPELLEES, v. HARRY B. STOUT, IMPLEADED WITH GEORGE W. HOLDREGE ET AL., APPELLANTS.

FILED NOVEMBER 21, 1893. No. 5216.

1. **Mechanics' Liens:** CONTRACT BY TENANT FOR LABOR AND MATERIAL. The mechanic's lien law requires that a contract for material, labor, etc., for the improvement of real property,

shall be made with the owner thereof or his agent. A tenant, as such, has no power to contract for labor or material so as to affect with a mechanic's lien the real property leased to him.

2. ———: TITLE TO PROPERTY: NOTICE. A person furnishing material for an improvement on real estate must take notice of the interest and title in the premises of the person with whom he contracted as shown by the public record, as his lien for labor and material, aside from the improvement itself, attaches only to such interest. *Henry & Coatsworth Co. v. Fisherick, Admr.*, 37 Neb., 207.)

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

The facts are stated in the opinion.

*Beeson & Root*, for appellants:

It is not claimed the owner of the fee ever authorized the building of the structures, or even knew they were constructed. No lien, therefore, attached. (Sec. 1, ch. 54, Comp. Stats.; *Stevens v. Lincoln*, 114 Mass., 478.)

The lien could not attach to a greater interest than the lessee had in the premises. (*Breed v. Nagle*, 46 Ga., 112; *Harman v. Allen*, 11 Ga., 45; *Ombony v. Jones*, 19 N. Y., 234; *Knapp v. Brown*, 45 N. Y., 207.)

There being no privity of contract between the landlord and his tenant, no agency between them claimed or proved, and nothing pleaded or proved to create an estoppel, any lien plaintiffs might have would expire as against the premises or any fixtures thereon with the expiration of the tenant's term. The tenant could not, after the expiration of his tenancy, have removed any out-buildings from the premises, and plaintiffs would be in no better position than the tenant with whom alone they made a contract, and against whom they claim judgment. (*Bradford v. Higgins*, 31 Neb., 192; *Friedlander v. Ryder*, 30 Neb., 783.)

*J. H. Haldeman, contra.*

RYAN, C.

On January 30, 1889, H. A. Waterman & Son filed in the district court of Cass county, Nebraska, their petition, in which they made the following allegations:

"1. The plaintiffs complain and allege that on or about the 1st day of November, 1887, the plaintiffs entered into an oral contract with the defendant Harry B. Stout to furnish him lumber of different kinds and boards, lime and building materials, which lumber and materials are fully described in the schedule hereto attached, marked Exhibit 'A,' and is made a part hereof, for the erection of a granary and stable and out-buildings on the west half, southeast quarter of section thirteen (13), township twelve (12), range eleven (11), in Cass county, Nebraska.

"2. In pursuance of said contract the plaintiff furnished said lumber and materials described herein for the erection of said buildings above and herein described on or between the said 1st day of November and the 1st day of December, 1887, for the total sum of \$168.28.

"3. The defendant, at the time the plaintiffs furnished said lumber and material, was in possession and occupying said lands and tenements above described, and had some interest and right of possession by lease or otherwise, by, from, and through his co-defendant William H. B. Stout, who was then the owner in fee-simple of said premises.

"4. On the 23d day of February, 1888, and within four months from the time of furnishing said material, the plaintiffs made an account in writing of the items of said materials furnished the defendant under said contract, and after making oath thereto as required by law, filed the same in the clerk's office of Cass county, and thereby claimed and have a mechanic's lien therefor upon said lands and appurtenances and improvements thereon to secure the debt by said contract made.

"5. The sum of \$168.28 with interest from the 30th

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day of November, 1887, now remains due and unpaid on said account.   \*   \*   \*

“7. That there appears of record in the office of the register of deeds of the county of Cass and state of Nebraska, a deed dated the 27th day of December, 1888, purporting to sell and convey said real estate to R. C. Cushing, George W. Holdrege, and L. H. Tower, which deed appears to have been signed and acknowledged by said defendant William H. B. Stout and Laura A. Stout, his wife.”

In the ninth paragraph of their petition the plaintiffs alleged that R. C. Cushing, George W. Holdrege, and L. H. Tower, if they did purchase said premises from their co-defendant Stout, held the same subject to the rights, equities, and lien of the plaintiffs herein. The prayer of the petition was for judgment against the defendants for the sum of \$168.28, with interest from November 30, 1887, and that said premises might be sold to pay and satisfy the lien and debt due plaintiffs; and that if the same should not be sold as upon execution, or if the title should be defective, then that said premises be leased as provided by law, and the proceeds of the rent applied to the payment of plaintiffs' lien; that Harry B. Stout be adjudged to have had, when the debt was contracted and the contract made to furnish the material, an equitable right, title, and interest in and to the lands; that said R. C. Cushing, George W. Holdrege, and L. H. Tower be adjudged to have no title or interest in said lands superior to the plaintiffs. Following this there was a general prayer for equitable relief.

To this petition there was filed on March 11, 1889, the demurrer of William H. B. Stout on the following grounds, as therein stated: “Comes now the defendant William H. B. Stout, separately for himself only, and demurs to the petition filed by the plaintiffs herein, for the reason that said petition does not on its face state facts sufficient to consti-

tute a cause of action against this defendant and in favor of plaintiffs." This demurrer was sustained, and thereupon, as to William H. B. Stout, the plaintiffs dismissed their action.

In due time Harry B. Stout answered, denying the alleged sale and the furnishing of the material to him, as well as the alleged contract with him in respect thereof. He also denied the alleged filing of the claim for a lien, as well as the existence of the balance due from him to the plaintiffs. R. C. Cushing, George W. Holdrege, and L. H. Tower by their answer, in effect, denied each averment of the petition above recited, and alleged that plaintiffs never at any time filed a mechanic's lien upon the land in question, and averred that these last named answering defendants purchased said land without any notice of any mechanic's lien upon said premises, for a good and valuable consideration, long before the commencement of the suit. This answer ended with a prayer that the cause be dismissed, and that the therein answering defendants might have proper equitable relief. The averments of new matter in the several answers were denied by reply of plaintiffs.

On the trial there was offered in evidence the sworn statement for a mechanic's lien, the indorsement upon which showed it to have been filed February 23, 1888. This, as well as the itemized statement of account by which it was accompanied, showed the material therein described to have been furnished defendant Harry B. Stout; and the lien claimed in respect of the land described in the petition was also as against Harry B. Stout. The material, as shown by the statement of account filed for the purpose of obtaining a lien, was furnished in the month of November, 1887. There was oral evidence that H. B. Stout had admitted after the commencement of the action that the aforesaid account was all right and had promised to pay it. There was then offered in evidence the following stipulation, the title being omitted: "The defendants George W.

Holdrege, R. C. Cushing, and L. H. Tower admit that their co-defendant, Harry B. Stout, purchased the material of plaintiffs as set out in their petition, and for the purpose therein stated; that there is due from their co-defendant, Harry B. Stout, to the plaintiffs the sum of \$168.28, with interest thereon from the 30th day of November, 1887; that at the time said indebtedness was contracted with the said Harry B. Stout, he was occupying the premises described in the above entitled cause as the tenant of William H. B. Stout, who at that time, and during said occupancy by said Harry B. Stout, was the owner in fee of said premises; and that said William H. B. Stout was the owner of said premises from the 1st day of November, 1887, until the month of December, 1888. The defendant Harry B. Stout admits that he purchased the materials set out in plaintiffs' petition as therein alleged and for the purposes therein stated, and that the amount claimed in plaintiffs' petition against him is correct and a just debt by him owing to said plaintiffs, and that the same is wholly unpaid." This stipulation was signed by the parties defendant therein named. Following this there was introduced this stipulation: "The plaintiffs admit that the defendants R. C. Cushing, George W. Holdrege, and L. H. Tower are *bona fide* purchasers, for a valuable consideration, of the premises described in the petition of plaintiffs; that they purchased the same in December, 1888, and that they purchased the same without any actual notice of the mechanic's lien claimed on said premises by plaintiffs other than such constructive notice as the records of the register of deeds of Cass county would impart to them." This stipulation was signed by the plaintiffs by their attorney. There was no other evidence offered than that above described.

The petition alleged that the material furnished for making the improvements on the premises therein described was furnished pursuant to an oral contract with Harry B. Stout, who, as the petition alleged, was, at the time the material

was furnished, in possession of and occupying said lands and tenements, and had some interest and right of possession as to the same by virtue of a lease or otherwise by, from, or through William H. B. Stout, who was the owner in fee of said premises.

Section 1, chapter 54, Compiled Statutes, requires that a contract for material, to entitle to a lien, shall be made with the owner of the land whereon the improvement is to be made, or with his agent. It in no way countenances the right to base a lien upon a contract with a tenant, though he may be in possession of the premises. To allow a mere tenant to incumber land for its improvement would be extremely dangerous to the rights of the landlord, and in case of a long-time lease, would place it within the power of the tenant to make his holding extremely valuable. A party who furnishes material or labor for improvements to be made upon real property can only have a lien declared effective as against such interest in the property improved as the person purchasing the material is vested with. (*Henry & Coatsworth Co. v. Fisherick, Admr.*, 37 Neb., 207.) While the stipulation afforded evidence that the material was furnished to Harry B. Stout for the purposes stated in the petition, there is no evidence whatever that any erection or improvement was ever made therewith upon the real property of William H. B. Stout, of which Harry B. Stout was in possession. There was no warrant, therefore, neither in the averments of the petition, nor the proofs adduced, for enforcing a lien against the real property described in said petition as against the owner or his grantees. In so far as there was a personal judgment against Harry B. Stout; the decree was supported by the evidence, and will not be disturbed, but in other respects the judgment of the district court is reversed, and in this court a decree will accordingly be entered.

DECREE ACCORDINGLY.

## DAVID R. BUSH ET AL. v. BANK OF COMMERCE.

38	403
55	480
38	403
57	648

FILED NOVEMBER 21, 1893. No. 5175.

1. **An amendment of an answer to meet the proofs was properly refused when such amendment, taken in connection with the other averments of the answer, even if clearly proved, constituted no defense.**
2. **Motion for New Trial: PREJUDICE OF JUDGE: EVIDENCE.** Where a motion for a new trial was predicated upon the alleged prejudice of the judge to whom a trial of the cause had been had, it was not error to overrule said motion when there was no proof to support its allegations.
3. **Trial in County Court: WITHHOLDING JUDGMENT: HARMLESS ERROR: REVIEW.** After introduction of the evidence, the case was taken under advisement for four days by the county judge to whom it had been tried, and on the fourth day the defendants appeared and moved for leave to amend their answer to conform to the proofs; and it appearing that the note upon which the suit had been brought could not be found, the parties stipulated that a copy should be used in evidence. *Held*, That even if it was error to withhold judgment for four days, the above facts show that the case was not finally submitted for judgment until the fourth day, being that upon which judgment was rendered.

**ERROR** from the district court of Johnson county. Tried below before BROADY, J.

The opinion contains a statement of the case.

*A. M. Appelget*, for plaintiffs in error:

It was error to overrule the motion for leave to amend defendants' answer. (Sec. 14, ch. 32, Comp. Stats.; *Loeb v. Millner*, 21 Neb., 392.)

The county court is controlled by the same law in the entering of judgments as is a justice of the peace, and must render judgment within four days from the time of trial.

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Bush v. Bank of Commerce.

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(Sec. 1002, Code; *Cox v. Tyler*, 6 Neb., 297; *State v. Smith*, 11 Neb., 239; *Vaughn v. O'Conner*, 12 Neb., 478.)

*L. C. Chapman and B. F. Perkins, contra.*

RYAN, C.

On the 7th day of December, 1889, Ross & Bush executed and delivered to the Bank of Commerce, of Hemingford, Nebraska, their promissory note for \$1,596.41, payable January 7, 1890. To secure payment of this note the makers thereof made a chattel mortgage contemporaneously with the making of the note. Default was made in the payment of the note, and the mortgage was foreclosed, leaving unpaid after the sale of the mortgaged chattels a large balance, for which judgment was subsequently rendered in the sum of \$858.39, on April 15, 1891, in the county court of Johnson county, Nebraska.

1. It is argued that the county court erred in refusing to permit an amendment of defendants' answer in conformity with the proofs. It is insisted that these proofs were, that the mortgage was not filed in the county wherein the mortgagors had their residence. The filing, however, was not necessary to the validity of the mortgage as between the original parties thereto; hence the proposed amendment presented no defense, even if supported by the proofs, and the court did not err in refusing to allow it to be filed. (*Horbach v. Marsh*, 37 Neb., 22.)

2. The petition of the plaintiffs in error stated the next ground of complaint in the following language: "That the court erred in overruling the motion of the defendants [plaintiffs in error] asking for a new trial on the ground of the partiality of the judge trying said cause, and undue means used in obtaining said judgment." This assignment might be disposed of upon other grounds, but it is deemed but fair to the county judge, who tried this cause, to say that this imputation of unfairness is unsupported by any

proof, even if the affidavit of S. D. Porter, found in the record, should be considered for all that it contains. The language thereby imputed to the county judge was only that if he decided in favor of the defendants the public would assume that it was for such defendants solely because one of the defendants was a county officer, and outside parties could not get justice against a county officer. The affiant, however, expressly stated that he did not understand the county judge to say that the outside opinion referred to would influence his judgment in deciding the case. Upon this sort of a showing the county judge very properly ignored the imputation of bias or prejudice. The verdict of a jury could not be impeached by such a showing as applying to one or more jurors. It was little if anything short of impertinence to make it to the judge to impeach his judgment. No matter what this affidavit disclosed, however, it cannot be considered in this court for the very sufficient reason that it was never incorporated in a bill of exceptions.

3. The last error argued is, that the county court rendered judgment four days after the case was taken under advisement. It seems, however, that on the said fourth day defendants filed a motion for leave to amend their answer, which the court passed upon, after which the record recites that "the note being mislaid, the court issued judgment on the copy pending an agreement of attorneys to stipulate. Wherefore it is by me this 15th day of April, 1891, considered and adjudged," etc. If a conjecture could safely be hazarded as to the meaning of the above language, it would be that the note being lost, the attorneys stipulated that a copy might be used as evidence, and in all probability that is what was really done. If this assumption is correct, the final submission did not actually take place until the date of the judgment. This is not a matter of great moment, however, for if there was, as plaintiffs in error claim, no valid judgment rendered on the 15th day of

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April, 1891, this proceeding would of necessity be dismissed because of that fact. The judgment of the district court is

AFFIRMED.

38	406
41	904
88	406
43	549
38	406
44	533
38	406
148	84
148	89
38	406
49	352
50	713
50	774
53	249

EDWARD MORRISSEY V. CHICAGO, BURLINGTON &  
QUINCY RAILROAD COMPANY.

FILED NOVEMBER 21, 1893. No. 5653.

1. **Surface Water: EMBANKMENT FOR RAILWAY PURPOSES.**  
Where the gravamen of plaintiff's action was the alleged negligent, improper, and careless construction of an embankment, from which resulted the overflow of plaintiff's land, it is proper to presume, in the absence of proof on the subject, that said embankment was, for railway purposes, properly constructed.
2. **A water-course must be a stream in fact as distinguished from mere surface drainage, rendered necessary by freshets or other extraordinary causes, though the flow of water need not be constant.** Following definition by MAXWELL, J., in *Pyle v. Richards*, 17 Neb., 180.
3. **Surface Water: OBSTRUCTION BY RAILROAD EMBANKMENT: DAMAGES: LIABILITY OF COMPANY.** The term "surface water" includes such as is carried off by surface drainage,—that is, drainage independently of a water-course,—and for the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course, a railroad company is not liable in damages to the proprietor of neighboring lands thereby incidentally overflowed and injured.

ERROR from the district court of Johnson county.  
Tried below before BROADY, J.

The opinion contains a statement of the case.

*Daniel F. Osgood and Talbot & Bryan*, for plaintiff in error :

Where waters of a stream disperse themselves over low

ground, without any well marked course, but gather up lower down into a defined channel, they are not surface water while in the dispersed state, and interference with them gives the injured party a right of action. (*O'Connell v. East Tennessee, V. & G. R. Co.*, 13 S. E. Rep. [Ga.], 489; *Macomber v. Godfrey*, 108 Mass., 219; *Gillett v. Johnson*, 30 Conn., 180; *Briscoe v. Drought*, 2 Ir. C. L., 250; *West v. Taylor*, 16 Ore., 165; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Ia., 659; *Moore v. Chicago, B. & Q. R. Co.*, 75 Ia., 263.)

A person through whose land a stream of water flows may construct embankments to prevent overflow; but in doing this must so construct them as not to throw the water upon his neighbor's lands, where it would not otherwise go. (*Wallace v. Drew*, 59 Barb. [N. Y.], 413; *Montgomery v. Locke*, 11 Pac. Rep. [Cal.], 874; *Burwell v. Hobson*, 12 Gratt. [Va.], 322; *Crawford v. Rambo*, 44 O. St., 279; *Byrne v. Minneapolis & St. L. R. Co.*, 36 N. W. Rep. [Minn.], 339; *Rau v. Minnesota V. R. Co.*, 13 Minn., 442; *Gerrish v. Clough*, 48 N. H., 9; *Carriger v. East Tennessee, V. & G. R. Co.*, 7 Lea [Tenn.], 338.)

A railroad company, in constructing an embankment which affects the flow of surface water, must provide sufficient culverts and outlets for the surface water, so that its ordinary flow will not be affected by reason of building such embankment, and the embankment must be constructed in a careful and skillful manner, and if done carelessly and negligently, and without sufficient passage-ways, the company will be liable. (*Philadelphia, W. & B. R. Co. v. Davis*, 6 Am. St. Rep. [Md.], 440; *Ohio & M. R. Co. v. Wachter*, 123 Ill., 440; *Austin & N. W. R. Co. v. Anderson*, 23 Am. St. Rep. [Tex.], 351; *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384; *Emery v. Raleigh & G. R. Co.*, 102 N. Car., 209; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill., 112.)

The owner of a dam is liable to his neighbor for injury done to his land by overflows occasioned by the dam, not

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only in ordinary stages of the water, but in times of ordinarily recurring freshets. (*Casebeer v. Moucry*, 55 Pa. St., 419; *McCoy v. Danley*, 20 Pa. St., 85; *Bristol Hydraulic Co. v. Boyer*, 67 Ind., 236.)

The superior proprietor of land inundated by a stream breaking away from its channel may turn the water back, but cannot discharge it from his own on the lands of another by any but its own channel. (*Tuthill v. Scott*, 43 Vt., 525; *Armenlaiz v. Stillman*, 67 Tex., 459; *Farris v. Dudley*, 78 Ala., 124; *Gibbs v. Williams*, 36 Am. Rep. [Kan.], 242.)

*J. S. Harris*, also, for plaintiff in error.

*Isham Reavis*, *amicus curiæ*, on the same points made by plaintiff in error, cited: 1 Addison, Torts, 106; *Louisville & N. R. Co. v. Hays*, 47 Am. Rep. [Tenn.], 291; *Little Rock & F. S. R. Co. v. Chapman*, 43 Am. Rep. [Ark.], 280; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Drake v. Chicago, R. I. & P. R. Co.*, 19 N. W. Rep. [Ia.], 215; *Davis v. Londgreen*, 8 Neb., 43; *Pyle v. Richards*, 17 Neb., 180; *Omaha & R. V. R. Co. v. Standen*, 22 Neb., 343.

*J. A. Kilroy*, *T. M. Marquett*, and *J. W. Deweese*, *contra*:

The common law is adopted by statute and declared to be law in this state. (Con. Stats., ch. 26, sec. 2088; *Wilson v. Bumstead*, 12 Neb., 4.)

The case containing the generally accepted statement of the common law rule, as to right of the proprietor to obstruct or change the direction and flow of surface waters fully sustains the view expressed by the trial judge in the instructions given to the jury in this case. (*Gannon v. Hargadon*, 92 Mass., 106.)

The contrary rule is that of the civil law. (*Martin v. Riddle*, 26 Pa. St., 415; *Kauffman v. Griesemer*, 26 Pa. St., 407.)

The confusion in the decisions of the courts on surface water questions arises almost wholly in states that have undertaken to enforce the civil law rule. The civil law in its application to surface water has been adopted in the following cases: *Nininger v. Norwood*, 72 Ala., 277; *Osburn v. Connor*, 46 Cal., 346; *Gillham v. Madison County R. Co.*, 49 Ill., 484; *Livingston v. McDonald*, 21 Ia., 160; *Lattimore v. Davis*, 14 La., 161; *Philadelphia, W. & B. R. Co. v. Davis*, 34 Am. & Eng. R. R. Cas. [Md.], 143; *Porter v. Durham*, 74 N. Car., 767; *Butler v. Peck*, 16 O. St., 334; *Tootle v. Clifton*, 22 O. St., 247; *Crawford v. Rambo*, 44 O. St., 279; *Kauffman v. Griesemer*, 26 Pa. St., 407; *Louisville & N. R. Co. v. Hays*, 11 Lea [Tenn.], 382; *Boyd v. Conklin*, 20 N. W. Rep. [Mich.], 595; *Little Rock & F. S. R. Co. v. Chapman*, 39 Ark., 463; *Gillison v. Charleston*, 16 W. Va., 284.

The instructions given by the court to the jury in this case are sustained by the well established decisions of all the states adhering to the common law rule. (*Taylor v. Fickas*, 64 Ind., 173; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 281; *Shelbyville & Brandywine Turnpike Co. v. Green*, 99 Ind., 215; *Cairo & V. R. Co. v. Houry*, 77 Ind., 364; *Morrison v. Bucksport & B. R. Co.*, 67 Me., 355; *Bowlsby v. Speer*, 31 N. J. Law, 352; *Chadeayne v. Robinson*, 55 Conn., 350; *Grant v. Allen*, 41 Conn., 156; *Gannon v. Hargadon*, 10 Allen [Mass.], 106; *Sweet v. Cutts*, 50 N. H., 439; *Buffum v. Harris*, 5 R. I., 253.)

The following cases hold that surface water can be treated as a common enemy, and fought against by embankments, ditches, or other obstructions, by any land-owner or railroad company in the construction of its road, without legal damage arising in favor of any party who is injured thereby: *Morrison v. Bucksport & B. R. Co.*, 67 Me., 356; *Greely v. Maine C. R. Co.*, 53 Me., 200; *Bangor v. Lansil*, 51 Me., 521; *Murphy v. Kelley*, 68 Me., 521; *Union v. Durkes*, 38 N. J. Law, 21; *Bowlsby v. Speer*, 31

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N. J. Law, 351; *Grant v. Allen*, 41 Conn., 156; *Chadeayne v. Robinson*, 55 Conn., 349; *Bates v. Smith*, 100 Mass., 181; *Turner v. Dartmouth*, 13 Allen [Mass.], 291; *Flagg v. Worcester*, 13 Gray [Mass.], 601; *Gannon v. Hargadon*, 10 Allen [Mass.], 106; *Parks v. Newburyport*, 10 Gray [Mass.], 28; *Sweet v. Cutts*, 50 N. H., 439; *Jones v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. [Mo.], 523.

In this case the railroad company did not interfere with any natural water-course. Water which once escapes from the banks of a natural channel, or a stream of water, by reason of a flood in the stream, occasioned by heavy rains or melting of snow upon the surrounding country, is surface water. (*McCormick v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo., 438; *Benson v. Chicago & A. R. Co.*, 78 Mo., 504; *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 271; *Taylor v. Fickas*, 64 Ind., 168; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Lessard v. Stram*, 62 Wis., 112; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis., 641; *Kansas City & E. R. Co. v. Riley*, 33 Kan., 374; *Jordan v. St. Paul, M. & M. R. Co.*, 42 Minn., 172; *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384; *Moyer v. New York C. & H. R. R. Co.*, 88 N. Y., 351; *Bell's Exrs. v. Norfolk S. R. Co.*, 36 Am. & Eng. R. Cas. [N. Car.], 651; *Shane v. Kansas City, St. J. & C. B. R. Co.*, 5 Am. & Eng. R. Cas. [Mo.], 71.)

The railroad company was not obliged to make culverts through its embankments, but had the right to build obstructions and fight off surface water in the proper construction of a railroad track with the necessary embankments. Still it would not be permitted to collect and concentrate surface waters by reason of its embankments, and then pour them through an artificial ditch or culvert in unusual quantities upon the land of adjacent proprietors. (*Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 147; *Pyle v. Richards*, 17 Neb., 180; *Shane v. Kansas City*,

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*St. J. & C. B. R. Co.*, 71 Mo., 237; *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *Hoganson v. St. Paul, M. & M. R. Co.*, 17 N. W. Rep. [Minn.], 374; *Chicago & A. R. Co. v. Benson*, 20 Am. & Eng. R. Cas. [Mo.], 101; *McCormick v. Kansas City St. J. & C. B. R. Co.*, 70 Mo., 359.)

RYAN, C.

Plaintiff sued the defendant in the district court of Johnson county, Nebraska, for damages which plaintiff alleged had been caused him by the defendant's improper, negligent, and care'less construction of a portion of its railroad, whereby the normal flowage of water over the land of plaintiff was greatly increased, causing the destruction, in 1888 and 1889, of crops and personal property thereon situated. Issue was duly joined and a trial resulted in a verdict for the defendant in accordance with the direct instructions of the court so to find.

The line of railroad of the defendant, running in an almost due westerly direction, crosses Yankee creek at a point about a quarter of a mile north and a little eastward of the northwest corner of the plaintiff's eighty-acre tract on which the alleged damage accrued. The Nemaha river is about one and a half or two miles north of above mentioned railroad crossing of Yankee creek, which empties its waters into said river. From the above crossing the line of railroad, continuing still in a westerly direction, touches the said creek at one of its numerous bends, from whence, pursuing the same westerly course for about one-fourth of a mile over bottom lands bordering on said creek, it reaches higher ground. There is no question made as to the necessity of putting in an embankment or other structure of the height of about eighteen feet between the point of contact of the railroad with Yankee creek and the higher ground, of which mention has just been made. An embankment was made without an opening through it, however, from which it resulted that the water which in former

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freshets had been discharged over the bottom land now crossed by the embankment was arrested in its course towards the Nemaha river and diverted to Yankee creek, causing thereby an increased volume of water to seek an outlet by way of that creek and the bottom lands beyond it, including those of plaintiff. To this increased flowage of water plaintiff attributed his injuries complained of, and for those injuries sought to hold the defendant liable.

The defendant proved that along its eighteen foot fill it had dug borrow pits and caused them to connect by a ditch with Yankee creek, into which creek all the water which, but for the fill, would have flowed across defendant's right of way, was emptied into Yankee creek by way of said line of borrow pits and ditch. While the evidence showed that the ground occupied by the fill was not level, but rather that there was a slight elevation along the bank of the creek on one skirting side, and toward the bluffs on the other skirting side, yet the whole was tilled or grass land, and was in no respect the bed of a stream. No present mention is made of the elements of damage or other matters in evidence, for, as the decision of this court depends so largely upon the correctness of the district court's conception of the law applicable to such facts as have been already stated, that comment upon these matters should logically follow the instructions given the jury, which were as follows:

"1. A long time ago there was a difference in the law of surface waters between the law of continental Europe, called the civil law, and the law of England, called the common law, which difference has come down through the states of this union. The law of this state is with the common law, which is that upon the boundaries of his own land, not interfering with any natural or prescriptive water-course, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands, and from any consequent repulsion

turning aside or heaping up these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries or permit them to flow off without artificial interference, unless within the limits of his own land he can turn them into a natural water-course, which he has a right to do.

“2. A railroad company, by its right of way, has the same right as a farm owner has to his farm, or any other land proprietor within the law of the above instruction, as to surface water.

“3. When and after water escapes from a natural stream by reason of a flood and spreads over the low lands, it is then surface water, and continues so until it gets back into some natural stream.

“4. The jury are instructed that a water-course may exist without a perpetual or constant flow of water; but there must be a channel in the ground showing the location of the stream, and it must be a stream in fact as distinguished from mere surface drainage caused by freshets or overflows of creeks or streams of water.

“5. Under the law as above given the undisputed testimony shows that the defendant obstructed only surface water, and not any water-course, and that defendant is not liable on the case made by the evidence in this case. You will therefore find for defendant.”

The petition claims damages resulting from improper, negligent, and careless construction of the railroad embankment. There was no evidence of such improper construction as is alleged, except inferentially from proof, first, that the former course of a part of the surface water was over ground subsequently occupied by defendant's embankment; second, that before the embankment was made plaintiff's land had never been overflowed; third, that since the embankment had existed plaintiff's land had been overflowed

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once in 1888 and once in 1889, the embankment having been made in 1882.

Plaintiff contends that if, by proper caution, the defendant might have avoided or prevented the injury to plaintiff's premises, the want of such caution is sufficient to justify a verdict for the necessarily resulting damages. (*Rau v. Minnesota V. R. Co.*, 13 Minn., 407; *Bellinger v. New York C. R. Co.*, 23 N. Y., 42; *Radcliff's Exrs. v. Mayor of Brooklyn*, 4 N. Y., 195; *Lawrence v. Great Northern R. Co.*, 16 Q. B. [Eng.], 643; *Crawford v. Rambo*, 44 O. St., 279.) In the case of *Gillham v. Madison County R. Co.*, 49 Ill., 484, Breese, C. J., delivering the opinion of the court, said: "The case was this: Plaintiff in error was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains or otherwise, flowed onto the land of the plaintiff, and which, by means of a depression in his land, ran off his land to adjoining land and thence into a natural lake. The defendant, the railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing, without leaving an opening in the embankment for the water to flow on and escape, was alleged in the declaration. A demurrer was sustained to the declaration." For error in sustaining such demurrer the judgment was reversed. These citations seem to establish quite satisfactorily the proposition that the defendant is liable for whatever damage results from a failure on its part to exercise proper care in the construction of its embankment. There was no evidence as to whether or not the embankment was the safest means by which the railroad company could have crossed that part of the bottom land over which its embankment was made, having reference solely to the construction and operation of its line of railroad. In the absence of any proof on that subject it is, perhaps, not going too far to assume that the railroad com-

pany, in so far as concerns its safety and efficiency in the operation of its line of railroad, adopted the most approved course in constructing this embankment. As to its liability for injury which that course is alleged to have caused, the question in this case arises. Before the action was begun the statute of limitations had barred any right to recovery which plaintiff might have had for injuries directly resulting from the proper construction of the defendant's embankment. This eliminates that class of questions from our consideration. (See *Carriger v. East Tennessee V. & G. R. Co.*, 7 Lea [Tenn.], 388; *Omaha & R. V. R. Co. v. Moschel*, 38 Neb., 281.)

The questions left for our inquiry are: First, was the water which was diverted by the embankment mere surface water as assumed in the third, fourth, and fifth instructions of the court above quoted? And, second, had the railroad company the right, if required by the proper construction and operation of its road, to divert such water into Yankee creek without liability for the consequent increase in flowage on plaintiff's land across said creek?

1. Under the first of these propositions let us consider the cases cited by plaintiff.

In *Crawford v. Rambo*, 44 O. St., on page 282, the court said: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel, so that when swollen by rains and melting snows it extends and flows over the bottoms along its course, that is its flood channel, as when by droughts it is reduced to its minimum, that is its low water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to

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be such until it reaches some well defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream, and ceases to be surface water."

In *Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn., on page 214, Dickinson, J., delivering the opinion of the court, said: "When in times of ordinary high water the stream extending beyond its banks, is accustomed to flow down over the adjacent low lands in a broader but still definable stream, it has still the character of a water-course, and the law relating to water-courses is applicable rather than that relating to mere surface water. (*Crawford v. Rambo*, 44 O. St., 279.)"

*O'Connell v. East Tennessee V. & G. R. Co.*, on page 449 of American Railroad and Corporation Reports, annotated, vol. 4, seems quite strongly to countenance plaintiff's contention. Lumpkin, J., delivering the opinion of the supreme court of Georgia in this case, uses the following language: "Thus it is material to consider whether the overflow as above stated is properly classed with surface water. This depends upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current or leaves the stream never to return, and spreads out over the lower ground, it has become surface water; but if it forms a continuous body, with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river. The identity of a river does not depend upon the volume of water which may happen to flow down its course at any particular season. The authorities hold that a stream may be wholly dry at times without losing the character of a water-course. So, on the other hand, it may have a 'flood channel,' to retain the surplus waters until they can be discharged by the

natural flow. The low places on a river act as natural safety valves in times of freshet; and the defendant claims the right to stop up one of these without liability for ensuing damage." The last sentence quoted comprehensively states the subject of contention in that case. Throughout its entire discussion the distinction above stated is observed and enforced by the citation of numerous adjudications. It was not argued that the same result would follow if the water should be properly classified as mere surface water that would follow under the circumstances above indicated. The opinion is quite lengthy, and very ably considered. It is introduced with the following statement of the propositions under consideration: "The precise question in this case is, whether the owner of land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow in times of flood upon the lands of the opposite proprietor to the injury thereof; or is there any duty for each owner to receive upon his land the share allotted it by nature of the flood waters of the river? It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is surface water, against which, by the common law, a man might protect himself, without regard to the consequences to his neighbor. Many cases cited by him make a distinction between the common law and the civil law as to surface water, the former allowing the land-owner to dispose of it in any way, the latter restraining him from so using it as to injure his neighbor's tenement. There is authority to show that there is no difference between the common and the civil law in this respect, but that the common follows the civil law. (*Gillham v. Madison County R. Co.*, 49 Ill., 484; *Gormley v. Sanford*, 52 Ill., 158, and the able opinion in *Boyd v. Conklin*, 54 Mich., 583.)"

From the line of argument pursued in the above cases cited by plaintiff, it would seem that the mooted question is not so much as to the principles properly applicable to

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surface water as to the difficulty of defining what is surface water. The defendant has cited several cases which we will now consider, for it is believed that from them it will also appear that the difficulty is not so much as to the law applicable to surface water as in defining that term.

In *Morrison v. Bucksport & B. R. Co.*, 67 Me., on page 356, occurs the following language: "But there must be a boundary to this proprietary right somewhere. Therefore it is that the principle is limited to the control of surface water and cannot be extended to a water-course or brook. A water-course cannot be stopped up or diverted to the injury of other proprietors. There is a public or natural easement in such a stream belonging to all persons whose lands are benefited by it. The two things, surface water and water-course, however, are not to be confounded. To constitute a water-course it must appear that the water usually flows in a particular direction and by a regular channel, having a bed with banks and sides and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well defined and substantial existence. It is contended in some cases that there may be an exception to this description of a water-course in the case of gorges or narrow passages in hills or mountainous regions; but there is a broad distinction between a stream or a brook constituting a water-course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows flowing over the entire face of the tract of land and filling up low and marshy places and running over adjoining lands and into hollows and ravines which are in ordinary seasons destitute of water and dry. (*Luther v. Winnisimmet Co.*, 9 Cush. [Mass.], 171; *Ashley v. Wolcott*, 11 Cush. [Mass.], 192-195; *Hoyt v. City of Hudson*, 27 Wis., 656; *Bowlsby v. Speer*, 31 N. J. Law, 351; Angell, Water Courses, sec. 1, *et seq.*; Wash., Easements, c. 3, sec. 1, *et passim.*)"

In *Taylor, Admr., v. Fickas*, 64 Ind., on page 172, is the following discussion of this subject: "The property in water that passes along and through a water-course which has a bed, channel, and banks, where it usually flows, is a mere usufruct interest, continuing only while the water is passing over the lands of the owner. He has the right to receive it where the water-course, in its natural channel, enters his land and to use it while it is passing over his lands, but he is required to return it to its channel when it leaves his land. (2 Bouvier, Law Dic., p. 66; Angell, Water Courses, secs. 94, 135.) The property in the lost water that percolates the soil below the surface of the earth in hidden recesses without known channel or course, and property in the wild water that lies upon the surface of the earth or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers, fall within the maxim that a man's land extends to the center of the earth below the surface and to the skies above, and are absolute in the owner of the lands as being a part of the land itself."

A water-course is thus authoritatively considered and defined by MAXWELL, J., in *Pyle v. Richards*, 17 Neb., 180: "The testimony tends to show the following facts: That the lands of the plaintiff and defendant are south of the Nemaha river, in Richardson county, and that the Atchison & Nebraska railway runs nearly on the line between their respective tracts of land; that the plaintiff's land is south of and higher than that of the defendant; that one or more ravines extend some distance above the plaintiff's land, in which are certain springs, from which during a great portion of the year flows a small stream. As stated by one witness, 'in very dry weather once in a while it went dry or partially so. Down at the road it sinks a great deal of the time. In wet weather it runs all of the time.' The

natural course of the stream is northeast through the plaintiff's land. The plaintiff built a dam across this water-course and made a new channel for the stream running north, so that its waters were discharged against the railroad, thence through what is designated in the testimony as the west culvert on the lands of the defendant. The testimony also tends to show that a large amount of surface water from melting snows or heavy rains also flows through said water-course. To constitute a water-course the size of the stream is immaterial. It must be a stream in fact as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant. (*Shields v. Arndt*, 3 Green Ch. [N. J.], 234; *Gillette v. Johnson*, 30 Conn., 180; *Bassett v. Mfg. Co.*, 43 N. H., 569; *Dudden v. Guardians*, 38 Eng. Law & Eq., 526.) In *Shields v. Arndt* it is said: 'There must be water as well as land, and it must be a stream usually flowing in a particular direction. It need not flow continually, as many streams in this country are at times dry.' When water has a definite source, as a spring, and takes a defined channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner by the diversion."

The evidence in the case under consideration fails to show that the water complained of was a part of Yankee creek before crossing the right of way now occupied by the defendant's embankment, though there is evidence from which it might be inferred. It seems, too, that it was ultimately discharged into the Nemaha river independently of Yankee creek. It therefore seems not to have had an outlet by a water-course within the definition given by MAXWELL, J., in *Pyle v. Richardson*, *supra*. It does not satisfactorily appear from the evidence that it was a part of the flood water of Yankee creek; neither is it shown that but for the railroad embankment it would have sought an

outlet by way of that creek. This water, therefore, under any of the definitions above given, was but surface water, and any interference therewith must be governed by the law applicable to water of that description.

2. As the distinction between the civil and common law referred to in the instructions of the court is rather curious than necessary, it will not be analyzed or historically considered. The law of surface water had not received the attention of the courts of this country at the time some of the decisions cited were made, which has since been devoted to that subject. It is therefore more profitable to consider rather what is now the recognized law of the country than what was the common law as enunciated by the courts of England.

The first instruction given by the court stated the law as follows: "That upon the boundaries of his own land not interfering with any natural or prescriptive water-course the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across the adjacent lands, and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands he will not be responsible; but such waters as fall in rain and snow upon his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his own land he can turn them into a natural water-course, which he has the right to do." In the latter part of this instruction it is barely possible that the court may have erred as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land or come there by surface drainage, unless within the limits of his own land he can turn them into a natural water-course. It is unnecessary to determine this question,

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though it may not be amiss to remark that we know of no law which would require a proprietor to keep within his boundaries water of the description last referred to in this instruction. In no event would he be required to do more than permit the water to take its natural course. He would not be compellable to take affirmative action that it might be prevented from flowing over the lands of some other proprietor. But this part of the instruction is not material in this inquiry. Whether or not the statement of the law outside of that just criticised is correct, is the question with which we have now to deal. Out of the abundance of caution it is perhaps safe to premise that there has been held a clear distinction between the rights of a riparian owner as to the flow of a stream, and rights as to mere surface water; and furthermore, that it has been held that the rights of lot-owners in cities are not regulated by the same rules as obtain in respect of the subject-matter under consideration. The rights and liabilities of urban proprietors as affected by the flow of water in any way, as well as the rights of meddlers with the flow of water within water-courses, are, therefore, expressly excluded from consideration—still more from adjudication—in this case.

In *Gannon v. Hargadon*, 10 Allen [Mass.], 106, the court said: "The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil. \* \* \* A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whence-soever it may come, to pass off in a different direction and in larger quantities than previously. If such act causes damages to adjacent land, it is *damnum absque injuria*."

The following language was used in *Chadeayne v. Robinson*, 55 Conn., on page 350: "The general common law rule in reference to surface water is that stated in Gould on

Waters, section 267, as follows: 'The right of the owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.'"

In *Cairo & V. R. Co. v. Stevens*, 73 Ind., on page 281, this language occurs: "Dillon in his work on Municipal Corporations, speaking of the surface water, says: 'This the law very largely regards (as Lord Tenterden phrases it) as a common enemy which every proprietor may fight or get rid of as best he may. \* \* \* On the one hand, the owner of the property may take such measures as he deems expedient to keep the surface water off from him or turn it away from his premises onto the street; and on the other hand, the municipal authorities may exercise their powers in respect to the graduation, improvement, and repair of streets without being liable for the consequential damages caused by surface water to adjacent property.'"

In *Morrison v. Bucksport & B. R. Co.*, 67 Me., on page 355 *et seq.*, the following language occurs: "It is a fundamental maxim of the law that a man may use his own land for lawful purposes as he pleases. He may make erections or excavations thereon to any extent whatever. Within his own limits he can control not only the face of the earth, but everything under it and over it. Thereby the estate of another man may be injuriously affected, much loss and hardship even might grow out of it, but it is not a legal injury and there is no legal remedy for it. Such results are

necessarily incident to the ownership of land. \* \* \*

Among other results from the application of this principle, it is well established that any proprietor of land may control the flow of mere surface water over his own premises according to his own wants and interests without obligation to any proprietor either above or below. There may not be an entire coincidence of view in the cases in this country as to the extent of the right of the upper proprietor in this respect, but in all the cases the principle is admitted. He may prevent surface water from coming upon his land according to its accustomed flow, whether flowing thereon from the highway or any adjoining land. (*Bangor v. Lansil*, 51 Me., 521.) He may prevent its passing from his land in its natural flow. (*Gannon v. Hargadon*, 10 Allen [Mass.], 106.) It was said in *Rawstron v. Taylor*, 11 Exch. [Eng.], 369, that one party cannot insist upon another maintaining his field as a mere water-table for the other's benefit. He may erect structures upon his own land as high as he pleases, without regard to its effect upon surface water, no matter how much others are disturbed by it. (*Flagg v. Worcester*, 13 Gray [Mass.], 601; *Bates v. Smith*, 100 Mass., 181, 182.) And he may dig ever so deep upon his own land for proper purposes, although he thereby deprives his neighbor of the sources of water. (*Chase v. Silverstone*, 62 Me., 175.) If all this were not so, men could not reconstruct and utilize their landed estates without infinite trouble and suits. But there must be a boundary to this proprietary right somewhere. Therefore, it is that the principle is limited to the control of surface water and cannot be extended to a water-course or brook."

In *Bowlshy v. Speer*, 31 N. J. Law, 351, is the following language: "The owner of land may at his pleasure withhold the water falling on his property from passing in its natural course onto that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming onto his own. In a word, neither the

right to discharge nor to receive the surface water can have any legal existence except from a grant, express or implied. The wisdom of this doctrine will be apparent to all minds upon very little reflection. If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built and every furrow that is made in the field is a disturbance of such right. If such a doctrine prevailed every acclivity would be and remain a water-shed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be, altogether impracticable. This subject, until a comparatively recent date, does not appear to have received the attention of the courts. No ancient authority can, therefore, be produced, but the topic has of late been discussed both by the barons of the exchequer and by the courts of Massachusetts, and the doctrine placed upon a footing which, as it seems to me, should receive the assent of all persons. Upon an examination of these cases it will be found that the conclusion is reached that no right of any kind can be claimed in the mere flow of surface water, and that neither its retention, diversion, repulsion, or altered transmission is an actionable injury, even though damage ensues."

The supreme court of Kansas in *Chicago, K. & N. R. Co. v. Steck*, 33 Pac. Rep., on page 602, employed the following language: "It is well settled that as a general rule the doctrine of the common law with respect to the obstruction and flow of surface water prevails in Kansas. (*Kansas City & E. R. Co. v. Riley*, 33 Kan., 374, 6 Pac. Rep., 581.) Under that doctrine an adjoining owner may not without liability obstruct the flow of water through a natural water-course; but to constitute such a water-course 'there must be a channel, a bed to the stream, and not merely low land or a depression in the prairie

over which water flows. It matters not what the width or depth may be. A water-course implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream.' (*Gibbs v. Williams*, 25 Kan., 214.) It has also been held that the mere 'fact that the owner of one tract of land raises an embankment upon it which prevents the surface waters falling and running upon the land of an adjoining owner from running off said land, and causes it to accumulate thereon to its damage, gives to the latter no cause of action against the former.'"

In *Kansas City & E. R. Co. v. Riley*, 20 Am. & Eng. R. R. Cases, 116, a Kansas case, it was held that a railroad company was not liable in damages for obstructing the flow of surface water from its natural course by the construction of an embankment when there was no channel or water-course containing living or running water obstructed.

In *Brown v. Winona & S. W. R. Co.*, 55 N. W. Rep., 123, the supreme court of Minnesota, having first excused the mistake in his understanding of the law, made by the trial judge, resulting from the loose, inartistic statements as to the subject under discussion formerly employed by that appellate court, thus stated its views: "For the sake of precision we will restate the question: When an owner improves his land for the purpose for which such land is ordinarily used, doing only what is necessary for that purpose, and being guilty of no negligence in the manner of doing it, is he liable because, as an incident of so improving, surface waters accumulate and flow in a stream upon the lands of others? A doubt upon this was suggested in the O'Brien case, but on more mature consideration we are of opinion that the owner so improving is not liable. The rule stated in that case has frequently been quoted in other cases in this court, and its correctness has never been questioned; and but for the doubt suggested in that case, we do

not think it would have been questioned that a case like this comes within it. One's land may be incidentally, even seriously, injured in value and usefulness by the proper improving of adjacent land, withdrawing from it surface waters, the presence of which may improve its fertility and value, or shedding upon it surface waters which would not otherwise go there and drowning it or otherwise impairing its value, or causing such waters to remain upon it, although their presence may render it comparatively valueless, and no action will lie. When the injury is incidental to the proper improving of adjacent land, it is impossible to see that the manner in which such improvement operates to cause the injury, whether by drawing off the waters or setting them back so that they cannot flow off, or causing them to run either in a diffused manner or in streams, can make any difference with the liability. If a man's lands be injured to the extent of \$500 by surface water coming upon it, it would seem illogical and unreasonable that he may recover if it come in streams, but cannot recover if it come in a diffused manner. The test of liability must be: is the injury incidental to another man doing on his own land what he has a right to do; i. e., improve it for the purpose for which such land is ordinarily used, doing what is necessary for that purpose? It must, however, be understood that one cannot improve his own land by merely transferring waters which would naturally rest upon it to the land of another."

In Missouri there has been some contrariety of opinion, but the law of that state on this subject is now settled, as shown from the following quotation from *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. R. Cases, pp. 110 *et seq.*: "In the recent case of *Benson v. Chicago & A. R. Co.*, 78 Mo., 504-512, s. c. *supra*, this court, speaking through Philips, C., practically reaffirms the common law doctrine of the earlier decisions of this court in respect to surface water. After referring to natural water-courses,

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this language is used: 'But as to the right of a dominant proprietor to divert mere surface water and turn its flow upon his neighbor, there is much conflict and confusion. Each case must in large measures depend on its own peculiar facts. The general rule, it is true, applicable to the enjoyment of real estate is expressed in the maxim, *cujus est solum, ejus est usque ad cœlum*. He has, ordinarily, the right to use and improve his real estate by protecting it against water flowing over its surface. In doing so the dominant proprietor may turn it from his land onto the servient or lower land, without liability to damage. Mere surface water, that which does not run in any defined course or confined channel, is regarded as a common enemy against which any land-owner affected by it may fight.'” After referring to the opinions which had been delivered in two Missouri cases, Ray, J., delivering the opinion of the court, continued as follows: “With all due respect for the acknowledged ability of the distinguished jurist who wrote those opinions, we feel constrained to recognize the common law doctrine on this subject, so often and repeatedly approved by this court without division in all its earlier and later decisions, as still the law in this state. The rule of the common law as expounded in the numerous decisions quoted above we think, after all, best promotes and conserves the varied and important interests of both the public and private individuals incident to and growing out of this question. It permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprises from unnecessarily or carelessly injuring another. It may be added, in this connection, that whatever change may have been made in the common law duties and obligations of railroad companies in this particular by sec. 810, Rev. St., 1879, 140, does not arise, and is immaterial in this case, since the suit is not brought for a failure to construct the ditches and drains along the sides of the road-bed required by that act.

but for a failure to provide water-ways or culverts across the road-bed or through its embankments so as to allow the surface water to pass off in that direction. A strict and literal application of the doctrine of the civil law would, we think, in many places and in large districts of country, materially retard, if not utterly destroy, many useful and profitable improvements, pursuits, and enterprises besides railroading. (*Sowers v. Schiff*, 15 La. Ann., 300; *Martin v. Jett*, 12 La., 503.) Numerous decisions in various other states also adopt and adhere to the common law as to surface water to the same extent as do the adjudications in this state. (13 Allen, 293; 27 Wis., 656; 25 Wis., 223; 31 N. J. Law [2 Vroom], 351; 50 N. H., 439; 58 Barb. [N. Y.], 413; 73 Ind., 278; and 24 Albany Law Journal, 453.)"

In the case of *Moyer v. New York C. & H. R. R. Co.*, 88 N. Y., 355, it was held that a railroad corporation was not liable for damages to any person by reason of the overflow of water of a stream caused by the necessary elevation of its road-bed not in the channel of the stream but upon its own land.

The supreme court of South Carolina, with reference to the general subject under consideration as affected by a statutory provision like that found in section 1, chapter 15, Compiled Statutes, made use of the following language in *Edwards v. Charlotte, C. & A. R. Co.*, 18 S. E. Rep., 58: "In view of the express declaration of the law-making power, as embodied in section 2734 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative decision to the contrary, that the common law rule must still be recognized as controlling here, for that section expressly declares that 'every part of the common law of England, not altered by this act nor inconsistent with the constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state

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in the same manner as before the passage of this act.' Under the common law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action. This rule was applied in a case very much like the present, *Rowe v. St. Paul, M. & M. R. Co.*, 41 Minn., 384, 43 N. W. Rep. [Minn.], 76; also in *Cairo & V. R. Co. v. Stevens*, 73 Ind., 278; *O'Connor v. Fon du Lac, A. & P. R. Co.*, 52 Wis., 526, 9 N. W. Rep. [Wis.], 287; *Johnson v. Chicago, St. P., M. & O. R. Co.*, 80 Wis., 641, 50 N. W. Rep. [Wis.], 771. See also *Chadeayne v. Robinson*, 55 Conn., 345, 11 Atl. Rep. [Conn.], 592, and *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo., 271, in which the case of *Shane v. Kansas City, St. J. & C. B. R. Co.*, 71 Mo., 237, relied upon by appellant, as well as the case of *McCormick v. Kansas City, St. J. & C. B. R. Co.*, 70 Mo., 359, are commented on and practically overruled, so far as the question now under consideration is concerned."

As indicated in some of the quotations above made, there are some states where, perhaps, the civil law or its analogies have been followed, in which the consensus of the above opinions is not approved. Whether influenced by the sources of their inspiration or not, these decisions are clearly in the minority, and we believe are not supported by the better course of reasoning.

Our conclusions are, that the district court correctly concluded from all the evidence adduced on the trial of this case that the water, the flow of which was interfered with by the railroad embankment, was surface water. It flowed in no defined water-course and overflowed only when there were extraordinary freshets. It was not shown that in its undiverted course it originated from or returned to the

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channel of Yankee creek. Its existence was directly traceable to falling rains. Its course was along the valley, but not as a part of the stream. The railroad company, in the absence of evidence to the contrary, must be presumed to have constructed its embankment in a manner proper for the operation of its line of railway. If in doing so, surface water was deflected from its course so as to be thrown across Yankee creek and over the land of the plaintiff, no right of action thereby accrued to plaintiff, even though at great expense, by erecting trestle work instead of such embankment, or by piercing the embankment with culverts, which by the discharge of water must of necessity injure other property, the damage to plaintiff might have been avoided or greatly lessened. So far as at all necessary for consideration, the instructions of the court recognized and enforced the principles above stated. It results, therefore, that the judgment of the district court is

AFFIRMED.

MAXWELL, C. J., dissenting.\* (December 29, 1893.)

From the statement of the case in the opinion of Commissioner Ryan it seems to me there is vital error in the decision. The constitution of Nebraska requires just compensation to be made to the owner of property taken or *damaged* for public use. The right to take is unquestioned where there is a necessity for the same, but this right is attended with the correlative one, that compensation must be made to the owner. The theory of the law is that the landowner shall be compensated in money for all direct injuries to the land resulting from the taking, unless the incidental damages are diminished by special benefits. These damages are to be computed upon the basis of the proper construction of the railway. (*Fremont, E. & M. V. R. Co. v. Whalen*,

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\* The opinion in this case, at the time it was filed, was concurred in by all members of the court. Subsequently the chief justice furnished the reporter the above dissenting opinion.

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11 Neb., 585.) In the case at bar there were no culverts in the embankment to permit the water to flow in its accustomed course toward the Nemaha river. Had there been, the damage in this case would not have occurred. This, in my view, was actionable negligence on the part of the company.

The case seems to be decided upon the theory that the railroad company has the right to exclude the water from its own land; but the statement shows that in fact the company diverted the water, turned it into artificial channels, and caused it to empty into Yankee creek, and thereby caused it to overflow and spread over the plaintiff's land and destroy his crops. Upon what theory can this be justified? Certainly not upon the ground that it was surface water. In *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb., 138, this court held that the railroad company had no right to collect surface water in a ditch or drain and permit it to flow upon the land of another without his consent; and the same rule applies to the case at bar. There is no analogy between the case of the owner of land excluding surface water from his premises and that of a railroad company. In the one case, the land-owner merely prevents the water from flowing onto his land; in the other, in the absence of culverts or bridges, a continuous barrier is presented to the flow of water which would thus be dammed upon the land above or thrown in a body upon the land below, in either case causing injury and loss. The projectors of a railway locate a line across a farm on which the surface water has theretofore had a free outlet, so that no injury has resulted from the backing up of the water or from it being collected and thrown in a body upon that farm or the lands below. In constructing the road, however, a solid embankment is made, by which the flow of water is obstructed and thrown in a body upon another part of the same farm or the lands of an adjoining land-owner, by means of which his crops are destroyed, and we

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are gravely told that the corporation has a right to do this. In *Boyd v. Conklin*, 20 N. W. Rep., 595, the supreme court of Michigan held that where surface water had been allowed to flow in a certain direction for more than twenty years, an easement was acquired by prescription. This opinion was approved in *Gregory v. Bush*, 31 N. W. Rep. [Mich.], 92. In no event can a party, by artificial drains or ditches, collect the surface waters and cast them in a body upon the proprietor below without being liable for the injury. (*Livingston v. McDonald*, 21 Ia., 160; *Butler v. Peck*, 16 O. St., 334; *Martin v. Riddle*, 26 Pa. St., 415; *Pettigrew v. Evansville*, 25 Wis., 223; *Gregory v. Bush*, 31 N. W. Rep. [Mich.], 92.) It is very clear to my mind that the railway company must provide sufficient openings in its road to permit the flow of surface water in its accustomed course and not cast it in a body upon the proprietor below. That system is best which, while protecting the railway company in its just rights, requires it to deal fairly with the persons across whose lands the road is constructed, in order that the public improvement shall not be the means of impoverishing any one. It is very evident that the court below erred in its instructions, and the judgment should be reversed and the cause remanded for a new trial.

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MOLINE, MILBURN & STODDARD COMPANY V. WILLIAM NEVILLE.

FILED NOVEMBER 21, 1893. No. 5402.

**Liability of Principal for Storage of Goods in Agent's Store-Room After Expiration of Agent's Individual Lease: LANDLORD AND TENANT.** After the expiration of a lease to a retail dealer in agricultural implements, some of the implements were permitted for a time to remain in the room wherein the business of said dealer had been carried on, after

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which said implements were turned over to the plaintiff in error. *Held*, That these facts did not render liable the plaintiff in error for the storage of said goods after the expiration of the term of the lease, even though in said retail business the lessee had been the agent of the plaintiff in error, no such relation having been disclosed by said lessee or at all acted upon by the lessor.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

*D. O. Dwyer and Beeson & Root*, for plaintiff in error, cited: *Durrell v. Emery*, 9 Atl. Rep. [N. H.], 97; *Dixon v. Ahern*, 14 Pac. Rep. [Nev.], 598; *Lathrop v. Standard Oil Co.*, 9 S. E. Rep., [Ga.], 1041; *Depere Co. v. Reynen*, 22 N. W. Rep. [Wis.], 761; *United States Mfg. Co. v. Stevens*, 17 N. W. Rep. [Mich.], 934.

*A. N. Sullivan, contra.*

RYAN, C.

This action was originally commenced before a justice of the peace in Cass county, Nebraska. From a judgment rendered in favor of the plaintiff in that court the defendant appealed to the district court of said county, wherein plaintiff's cause of action, omitting the mere formal parts, was stated in the following language:

"1. And now comes the above named plaintiff, and for cause of action states: At the special instance and request of the defendant, a corporation, plaintiff furnished its storage room for goods, wares, merchandise, and property of said defendant during the year 1891, from April 1, 1891, to June 15, 1891, for which defendant agreed to pay plaintiff what said storage was reasonably worth. The plaintiff alleges that said storage was really worth the sum of \$19.50.

"2. No part of said sum has been paid by the defendant to plaintiff, and there is now due and payable thereon

from the defendant to plaintiff the sum of \$19.50, for which sum plaintiff prays judgment."

The answer contained a general denial of the averments of the petition, succeeding which were the following allegations: "Defendant, further answering, states that it or none of its officers knew of plaintiff or his agents, or that there were such persons in existence, until the commencement of this suit; that it has no contract whatever, either verbal or written, with plaintiff or any of his agents to store any goods, wares, or merchandise." There were other averments in the answer which are unnecessary to notice.

The reply was in denial of each allegation of new matter contained in the answer.

Upon a trial had to the court judgment was rendered in favor of William Neville, against the Moline, Milburn & Stoddard Company, for the sum of \$15 and costs, taxed at \$66.43.

The proofs were that F. A. Burke, as lessee, first occupied the room in which it is claimed the goods of plaintiff in error were afterwards stored. The term of his lease began March 1, 1889, and he continued to occupy the room until April 1, 1891, during that time being engaged in business as a retail dealer in wagons and agricultural implements. Some of these implements he obtained in the course of his dealings with the Moline, Milburn & Stoddard Company, of Omaha, Nebraska. After April 1, 1891, some of the agricultural implements remained in the room until June 15, of the same year. On said 1st day of April a Mr. Munroe leased the aforesaid room, and from the 4th of April thereafter occupied the same until long after the date when, by plaintiff's petition, it is claimed that the storage ended. During the occupancy of this room by Mr. Munroe the implements, which had been left therein by Mr. Burke, were permitted to remain undisturbed until June 15, 1891, when those to which the facts of this case have any relation were turned over to the plaintiff in error. On the

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same date that these goods were turned over by Mr. Burke to the Moline, Milburn & Stoddard Company suit was begun by the defendant in error against the said company for the storage on said goods between April 1, 1891, and June 15, immediately following that date.

Plaintiff founded his cause of action upon an express contract with the said company for the storage of its goods, wares, and merchandise, the fair compensation for storing which he alleged that said company agreed to pay. There was undisputed evidence, perfectly satisfactory in its nature, that there was never any contract between the defendant in error and the plaintiff in error. The proof is also unquestionable that Mr. Burke received said goods of the plaintiff in error as he required them in his business, at the depot at Plattsmouth, and that for them thenceforward, until such as were not sold were returned to plaintiff in error at Omaha, Mr. Burke was solely responsible. Whether he received them for sale on commission is not quite clear, though that is probable from the evidence. Certain it is, however, he received and handled them in connection with and as he did many other agricultural implements of the same nature. The lease under which Mr. Burke held was made to him individually, the plaintiff in error not being therein known nor in any way recognized by the defendant in error as his agent. Under these circumstances, even if Mr. Burke was the agent of the plaintiff in error for the sale of its implements, this undisclosed principal could not be held liable for his individual contract, which had no reference either to said company or its business. (*Morgan v. Bergen*, 3 Neb., 209.) There was, therefore, no competent evidence to establish the claim for storage against the plaintiff in error, and the judgment of the district court is

REVERSED.

STATE OF NEBRASKA, EX REL. ATTORNEY GENERAL, V.  
ATCHISON & NEBRASKA RAILROAD COMPANY.

FILED NOVEMBER 21, 1893. No. 3010.

1. **Quo Warranto: RAILROAD COMPANIES: UNLAWFUL EXERCISE OF CORPORATE FRANCHISES: FORFEITURE: SUFFICIENCY OF EVIDENCE.** In *quo warranto* proceedings to declare void the lease by defendant of its line to another railroad company, and to annul a subsequent deed of defendant to said lessee, by which lease and deed it was claimed that a consolidation had been effected of parallel competing lines not forming a continuous line without break of gauge or interruption, it is *held*, upon full consideration of all the proofs upon which was made up the report of the referee, that each of his findings of fact and conclusions of law adversely to the material averments of the information is correct. MAXWELL, C. J., dissenting.
2. **The proofs and the report of the referee being adverse to each material allegation of the information, such information is dismissed.** MAXWELL, C. J., dissenting.

ORIGINAL action in the nature of *quo warranto* to oust defendant of its franchise. *Action dismissed.*

A former opinion in this case upon a demurrer to the information is reported in 24 Neb., 143.

*William Leese, C. G. Dawes, and George H. Hastings,*  
*Attorney General, for the state.*

*T. M. Marquett, J. M. Woolworth, and Marquett, Deweese*  
*& Hall, contra.*

RYAN, C.

This cause was considered and certain propositions of law applicable to the matters alleged in the information were fully stated, in 24 Nebraska, on pages 143 *et seq.* This was upon a demurrer to the said information on the

grounds of a defect of parties, and because the facts alleged did not entitle the state to the relief prayed. Upon the averments of the information, which, for the purposes of the demurrer, were conceded to be true, it was held that the lease of the respondent to the Burlington & Missouri River Railroad Company should be declared void. The respondent was given leave to answer the information, and, in due time, its answer was made, averring the existence of such facts as negatived all infringements of the provisions of the statutes and constitution of the state of Nebraska, charged in the information.

On the 24th day of March, 1891, by consent of the respective parties and their counsel, it was ordered that upon the pleadings, testimony, and exhibits, then ready for final consideration, this cause should be referred to John H. Ames, Esq., by whom, thereon, a report should be made stating his findings of fact and conclusions of law. Accordingly, on October 1, 1891, said referee filed his report, in respect to which were deduced and applied five conclusions of law, the last of which was that the information should be dismissed.

Summarized, the findings of fact relevant and material to the decision of the issues joined were substantially as follows: That the Burlington & Missouri River Railroad Company in Nebraska had, prior to January 15, 1872, constructed and acquired by leases lines of railway extending from Plattsmouth to Lincoln, and from Lincoln, by way of Crete, through the counties of Lancaster, Saline, and Gage, to the city of Beatrice, in the last named county, and from Lincoln, through the counties of Lancaster, Otoe, and Nemaha, to the town of Brownville, in the county last named; that said line from Crete to Beatrice practically constituted a branch from the main line of said Burlington & Missouri River Railroad Company extending to Kearney, and, if treated as a prolongation of said main line, was and is not parallel with, but divergent from the said

line of said defendant at substantially all points; after leaving said city of Lincoln this divergence being so great that the stations of Crete, on the first-named line, and of Hickman, on the defendant's line, the former about twenty miles and the latter about fifteen miles from Lincoln, are geographically more than twenty miles apart; that the line by way of Nebraska City to Brownville is not parallel to, but divergent from the said defendant's line at all points after leaving Lincoln, said divergence being as great as between the two lines above mentioned; all of said lines, however, converging to a common point, which is Lincoln; that from Beatrice to Tecumseh, which is the nearest point on defendant's line, is thirty-five miles, and from Tecumseh to Nemaha City, the nearest point on the Brownville line, is thirty miles; that since January 15, 1872, the lines of the Burlington & Missouri River Railroad Company, of the Chicago, Burlington & Quincy Railroad Company, and of the defendant have, as constructed and maintained, admitted of the continuous passage of cars from one to the other, without detention or break of bulk at Lincoln; that since January 1, 1880, all of said lines have been in the exclusive possession and under the sole control and management of said Chicago, Burlington & Quincy Railroad Company; that defendant's line constitutes a practical continuation and prolongation in nearly a right line southeasterly from Lincoln, Nebraska, to Atchison, Kansas, of the aforesaid line extending from Plattsmouth to Lincoln; and, as such continuation and prolongation, defendant's line, as respects the transportation of freight, has been, and is now, operated by the Chicago, Burlington & Quincy Railroad Company; that, first by lease, and afterwards by deed, the defendant's line of railroad was transferred to the Burlington & Missouri River Railroad Company, by which latter company it was duly, by deed, conveyed to the said Chicago, Burlington & Quincy Railroad Company; that pending the construction of defend-

ant's line of railroad, and in aid thereof, bonds were voted and issued to the defendant to the aggregate amount of \$397,700, by the counties of Richardson, Gage, and Lancaster, though upon what inducement the record does not disclose; that previous to January 1, 1880, defendant's line was in very bad repair, and very inadequately equipped with rolling stock, and unable to give a safe or effectual service, and on account of its financial embarrassment the defendant was unable to ameliorate these evils; that since January 1, 1880, the Chicago, Burlington & Quincy Railroad Company has practically reconstructed defendant's line of railroad by putting in new ties and the substitution throughout of new steel rails for the iron rails formerly in use thereon, and has built at Rulo, across the Missouri river, a bridge at a cost of one million dollars, so as to connect with its lines east of the Missouri river, and has placed in repair and furnished with rolling stock the defendant's line, so that now it is safe and efficient for use as a railroad; that within ten miles of Lincoln the Burlington & Missouri River Railroad Company's line and that of defendant were so near each other as to serve on nearly equal terms some of the traffic destined to Lincoln; but with this exception these lines were not competing, and the above exception did not render them within the meaning and effect of the provisions of the constitution of 1875, inhibiting the consolidation of railroad corporations owning parallel and competing lines; that there was no proof of competition for traffic between interstate points, and excepting at Lincoln there was no competition between points within Nebraska and other points outside its limits. The referee further found that such other competition as existed was between shippers stimulated to activity by a system of individual rebates common to the railroad companies previously to the enactment of the interstate commerce law by congress, or arose from occasional fortuitous circumstances, or combinations of circumstances, entirely foreign to the in-

hibitions of the statutes and the constitution of Nebraska. That there was no violation of such provisions by the defendant were substantially the referee's conclusions of law.

To these several findings of fact and conclusions of law there were filed exceptions which challenge the correctness of every conclusion, whether of law or of fact. These exceptions are criticised as inexact, general, and as unavailing as against the findings of the referee, especially as to matters of fact, the contention being that these must stand as the special verdict of a jury. It may be that these points are well taken, and that this case might be disposed of upon the presumption contended for. The magnitude of the interests involved and of the questions presented, as well as the consideration due to an application for a prerogative writ by the state, seemed to require that technicalities should be avoided as far as possible; and the evidence, therefore, has been as carefully read and considered as though no report had been made by the referee, with the same conclusions as had been set forth in his report. As the referee's findings fully and fairly epitomize the evidence as to questions of fact, and as his conclusions of law are in consonance with the principles recognized on the hearing of the cause on demurrer, it would be but a work of supererogation to examine the same matters in detail only to reach the same result. The exceptions to the report of the referee are overruled and the information is

DISMISSED.

MAXWELL, C. J., dissenting.

I am unable to give my assent to the opinion of the commissioners in this case approved by a majority of the court. The case was before this court in 1888, on demurrer to the relation. The demurrer was overruled and leave given to the defendants to answer. It may be well to call attention to the points decided in that case by a unanimous court (*State v. Atchison & N. R. Co.*, 24 Neb., 143), as follows:

“In a proceeding by *quo warranto* against a corporation to forfeit its franchises, and oust it from the same for mis-user or non-user thereof, the corporation is the only necessary party defendant. In case of forfeiture the court will take the necessary steps to protect the rights of other parties in the premises.

“Section 89 of chapter 16 of the Compiled Statutes authorizes the consolidation of two lines of railway only in cases where the two roads, when so consolidated, will form a continuous line without break of gauge or interruption.

“Section 94, chapter 16, of the Compiled Statutes authorizes the leasing of a railroad constructed by another company only in cases where the road of the lessee and of the company making the lease will form a continuous line.

“The Atchison & Nebraska railroad, extending from Atchison, Kansas, to Lincoln, Nebraska, was completed to Lincoln in 1871, and leased to the B. & M. railroad in 1880. *Held*, That it did not form a continuous line with the B. & M. railroad, and was not within the provisions of the statute authorizing the making of a lease, and that such lease was unauthorized. The mention in the statute of continuous or connected lines excludes all others.

“The powers of a corporation organized under legislative statutes are such, and such only, as the statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others.

“Where a railway company without authority of law leases its road to another railway company with all its rights, property, and franchises for a long period of time, it thereby abandons the operation of its road, and is subject to forfeiture.

“Section 3, article 11, of the constitution prohibits any railroad corporation from consolidating its stock, property, franchises, or earnings, in whole or in part, with any other

railroad corporation owning a parallel or competing line. The word 'consolidate' in the constitution is used in the sense of join or unite.

"Section 5, article 11, of the constitution prohibits the issuing by a railway corporation of stock or bonds except for the consideration actually received. One of the objects of this provision is to enable the public to ascertain the actual cost of each railway in the state, and to enable the legislature to pass just laws fixing an equitable rate of taxation, and for the transportation of persons and property, so that justice may be done alike to the railway company, the public, and private individuals."

Many of these points are not referred to in the opinion of the commissioner. Section 3, article 11, of the constitution prohibits any railway company from consolidating its stock, property, franchises or earnings, *in whole or in part*, with any other railroad corporation owning a parallel or competing line. It is admitted in the opinion that "within ten miles of Lincoln the Burlington & Missouri River Railroad Company's line and that of defendant were so near each other as to serve on nearly equal terms some of the traffic destined to Lincoln, but with this exception these lines were not competing, and the above exception did not render them within the meaning and effect of the provisions of the constitution of 1875, inhibiting the consolidation of railroad corporations owning parallel and competing lines."

It will be observed that it is admitted in the opinion, in effect, that at Lincoln, and within ten miles thereof, that the defendant road and the Burlington & Missouri River road were competing lines. If we take ten miles square in every direction from Lincoln, we will have 400 square miles of territory, which at the present time contains more than 50,000 people. This territory is sufficient to form a county, and is the minimum number of miles fixed by the constitution for that purpose. Yet the fact that the de-

fendant is a competing road with the Burlington & Missouri River road is spoken of as though it was a trifling matter, notwithstanding the language of the constitution that there shall be no consolidation, either in the stock, property, franchises, or earnings, or any part thereof, with any other parallel or competing line. The object of the constitutional convention was to prevent one or two corporations from purchasing parallel or competing lines and thus prevent competition. The defendant, if disconnected with the Burlington & Missouri River road, is a competing line for business in the territory named, and might, perhaps, by carrying for lower rates than the Burlington & Missouri River road, benefit every resident of the city of Lincoln and the territory adjacent, and thus induce new enterprises and promote the prosperity, not only of the city, but of the state. It is a well known fact, also, that the road was originally planned to extend to Columbus and there form a competing line with the Union Pacific railway, and the records of this court show that the residents of Platte county donated \$100,000 of its county bonds to that road, presumably to obtain a competing line. The majority opinion would allow the Burlington & Missouri River railroad to purchase the Union Pacific Railway as a competing line. It is well known also that the defendant line crosses the Burlington & Missouri River line at Seward, and would be a competing line there. It also crosses two Burlington & Missouri River lines at Lincoln, and a Burlington & Missouri River road at Tecumseh, and would be a competing line there. If competition could affect the rates of transportation for ten miles on each side of Lincoln, it would do the same for Columbus, Seward, and Tecumseh. Thus, if Lincoln, by reason of reduced rates, was enabled to pay an increased price for corn or stock, or to sell goods at a lower rate than without such competition it would be enabled to do, the same benefits would apply to Tecumseh, Seward, and Columbus, and

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other towns along the line of the defendant road, and attention being called to these lower rates on that line would cause a reduction of rates on other lines in the state; but it is a narrow view of the law to limit the benefits to be derived from competition to the cities named. The defendant road, crossing or connecting, as it does, every important railway line but one in the state, would, if permitted to remain as when constructed, an open and competing line, greatly benefit the people of the entire state. I am very confident also that this court has no power, if admitting that the defendant is a competing line at the most important point on the road, as is done in the opinion in this case, to declare that such consolidation is not prohibited by the constitution. There stands the constitutional provision, like a wall of rock, prohibiting such consolidation, or any consolidation, in such cases. Stronger language could not be used: "No railroad corporation \* \* \* shall consolidate its stock, property, franchises, or earnings, in whole or in *part*, with any parallel or competing railway line." It is not in the power of this court, therefore, to declare the consolidation in this case valid, and the time will come when the majority opinion will be held to be clearly in violation of the provisions of the constitution.

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JOHN V. FARWELL COMPANY V. WILLIAM E. WRIGHT  
ET AL.

FILED NOVEMBER 21, 1893. No. 5033.

1. **Fraudulent Conveyances: PREFERRED CREDITORS.** A debtor in failing circumstances has a right to secure, or pay in full, a portion of his creditors to the exclusion of others, and whether in so doing he is acting with a fraudulent purpose is a question of fact and not of law. (*Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800.)

38	445
40	215
38	445
45	140
38	445
49	223
50	419
38	445
57	558

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2. **An intention on the part of a debtor to defraud cannot be inferred merely from the fact that he desired to and did prefer certain of his creditors.** (*Jones v. Loree*, 37 Neb., 816.)
3. **Attachment: RIGHT OF ACTION ACQUIRED AFTER ISSUANCE OF WRIT.** An attachment must stand on plaintiff's cause of action as it existed when the affidavit for an attachment was filed and the writ issued; and if the plaintiff, at the date of the issuing of the attachment, does not own the claim for which he seizes the defendant's property, he cannot afterwards, by purchasing such claim, assert it by amendment or otherwise as against the property seized under the attachment and by virtue thereof.
4. ———: ———: **GROUND TO DISCHARGE.** Where a plaintiff brought suit, alleging as a cause of action his ownership of certain notes, then past due, made and delivered to him by the defendant, and at the same time filed an affidavit for attachment in which such notes were made the basis of such claim against the defendant, and caused the property of the defendant to be seized under said attachment, and it afterwards appeared that plaintiff was not the owner of said notes, or any of them, at the time of bringing such suit and instituting such attachment proceeding and seizing said property, *held*, that the attachment should be dissolved, although plaintiff, after the seizure of defendant's property, became the owner of said notes, and owned them at the time of the hearing of the motion to discharge the attachment.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

The opinion contains a statement of the case.

*R. A. Moore and John T. Wentworth*, for plaintiff in error:

The mortgages were voluntarily made without the knowledge of some of the mortgagees. By the mortgages Wright & Gregg conveyed all their property. The mortgages were, therefore, fraudulent and void, as being against the assignment law of this state. (Ch. 6, Comp. Stats.; *White v. Cotzhausen*, 9 Supreme Ct. Rep., 309; *Kellog v. Richardson*, 19 Fed. Rep., 70; *Kerbs v. Ewing*, 22 Fed.

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Rep., 693; *Freund v. Yaegerman*, 26 Fed. Rep., 812; *Liming v. Kyle*, 31 Neb., 649; *Straw v. Jenks*, 43 N. W. Rep. [Dak.], 941; *Harkrader v. Leiby*, 4 O. St., 602; *Dickson v. Rawson*, 5 O. St., 224; *Burrows v. Lehndorff*, 8 Ia., 96; *Lampson v. Arnold*, 19 Ia., 479; *Bonns v. Carter*, 20 Neb., 566.)

The mortgages are void because they are executed upon property in value greatly in excess of the debts secured. (*Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Morse v. Steinrod*, 29 Neb., 108; *Brown v. Work*, 30 Neb., 800.)

*Lamb, Ricketts & Wilson and Marston & Nevius, contra:*

It affirmatively appears from the petition and the amended petition that the plaintiff did not have at the time the attachment was taken out, nor yet at any time before the order dissolving it was entered, any cause of action against the defendants upon the supposed notes attempted to be sued on in this case. The attachment was properly dissolved. The plaintiff, by a subsequent purchase of the notes, cannot assert his claim against property seized under the attachment. (Wade, Attachment, sec. 72; *Bowen v. School District No. 3, Phelps County*, 10 Neb., 266; *Hamilton v. Johnson*, 32 Neb., 730; *Berry v. Hardman*, 12 Ala., 604; *Rick v. Thornton*, 69 Ala., 473; *Estlow v. Hanna*, 75 Mich., 219; *Pope v. Hibernia Ins. Co.*, 24 O. St., 481.)

The plaintiff is estopped to deny the validity of the first chattel mortgage by levying the writ of attachment subject to it; by buying up that chattel mortgage and asserting its validity; and by selling the property under the attachment and bidding it in subject to the mortgage. (*Russell v. Dudley*, 3 Met. [Mass.], 147; *Kellogg v. Secord*, 3 N. W. Rep. [Mich.], 562; *Mandelson v. Paschen*, 37 N. W. Rep. [Wis.], 815; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn., 9.)

The trial court having found the issues of fact in favor of the defendants upon the evidence, this court will not re-

verse the decision unless manifestly erroneous. (*Grimes v. Farrington*, 19 Neb., 45; *Britton v. Boyer*, 27 Neb., 522.)

None of the mortgages are open to the objection that they were made without the knowledge or consent of the mortgagees. It appears in the testimony that notice was immediately given to all the parties of the execution of the mortgages, and that such security was ratified and approved by the mortgagees prior to the attachment. In all such cases chattel mortgages are valid. (*First Nat. Bank of Emporia v. Ridenour*, 27 Pac. Rep. [Kan.], 150; *Bierbower v. Polk*, 17 Neb., 276; *Fletcher v. Martin*, 25 N. E. Rep. [Ind.], 886.)

RAGAN, C.

On May 4, 1891, William E. Wright and Charles H. Gregg, under the copartnership name of Wright & Gregg, were engaged in mercantile business in the city of Kearney, Nebraska; and on said date, being largely indebted and in failing circumstances, they executed chattel mortgages on their stock of merchandise as follows: (1) To the Kearney National Bank, \$3,575.00; (2) to L. C. Gregg, \$1,207.75; (3) to Seigel & Bro., \$2,970.95; (4) to Super, Marshall & Co., \$635.82. These mortgages were all duly filed on said date in the office of the county clerk of Buffalo county, and possession of the mortgaged property turned over to one Lyon for the mortgagees. The mortgages were made liens on the property covered by them, in the order named above, and were all given for honest debts owing at that time by Wright & Gregg to the mortgagees.

Wright & Gregg had for some time been dealing with the John V. Farwell Company, of Chicago, Illinois, and on the 16th day of February, 1891, owed that company \$5,379, for which amount Wright & Gregg at that date gave the Farwell Company several negotiable notes. These notes the Farwell Company soon afterwards sold for cash, guarantying their payment, and on said May 4, 1891. and for some

months thereafter, did not own any of said notes. On said date, however, Wright & Gregg did owe the Farwell Company a balance on account contracted since February, 1891, of \$638. On May 5, 1891, the Farwell Company brought suit in the district court of Buffalo county against Wright & Gregg, and claimed in the petition that Wright & Gregg were indebted to it in the sum of \$5,379 on the notes mentioned above, and that said notes were still the property of said Farwell Company and due and unpaid. At the same time the Farwell Company sued out an attachment against Wright & Gregg for \$6,017, and alleged in its affidavit for attachment the indebtedness of Wright & Gregg to it on the notes mentioned above, and caused a writ of attachment to be issued on said stock of merchandise, covered by said mortgages, to be seized by the sheriff. Said writ of attachment was, however, as appears from the sheriff's return thereon, levied upon said merchandise, subject to the mortgage executed by Wright & Gregg to the Kearney National Bank. On the 16th day of May, 1891, the Farwell Company filed an amended petition and affidavit for attachment. These declared not only on the notes but on the account mentioned above. On May 15, 1891, the attorney for the Farwell Company purchased of the Kearney National Bank the mortgage made to it by Wright & Gregg. This purchase was made ostensibly in behalf of and in the name of J. V. Farwell, Jr. On September 28, 1891, the Farwell Company having, in pursuance of its guaranty of said notes, taken the same up and become the owner thereof, filed another amended affidavit for attachment against Wright & Gregg, substantially the same as the first and second affidavits, but containing the additional allegation that Wright & Gregg had, by false pretenses, procured an extension of time for paying the debt represented by the notes. At this date, September 28, 1891, the cause was heard on the motion of Wright & Gregg to dissolve the attachment, and the court made an

order discharging the same, and from that order the Farwell Company prosecutes error to this court.

The grounds of attachment alleged in the affidavit of May 5, 1891, were that "the said defendants are about to convert their property into money for the purpose of placing it out of the reach of their creditors; that they have property and rights in action which they have concealed; that they have assigned and disposed of their property, or a part thereof, with the intent to defraud their creditors, and that the debt upon which said notes were based was fraudulently contracted by the defendants." There is no evidence in the record that Wright & Gregg, on May 5, or at any other time, "were about to convert their property into money for the purpose of placing it out of the reach of their creditors;" nor does the record contain any evidence that at the date of suing out said attachment, or at any other time, Wright & Gregg "had any property or rights in action which they had concealed;" and furthermore, the record discloses no evidence "that the debt upon which said notes were based was fraudulently contracted."

It remains to be determined, then, whether Wright & Gregg "had assigned and disposed of their property, or a part thereof, with the intent to defraud their creditors." The only claim of a fraudulent disposition made by Wright & Gregg of their property is the giving of the mortgage above mentioned.

The first contention of the plaintiff in error is that the making of these mortgages by Wright & Gregg, and their delivery of the possession of the mortgaged property to the mortgagees, or to Lyon for them, amounted to an assignment for the benefit of Wright & Gregg's creditors, and that the mortgages, not being in conformity with the assignment law of the state, are therefore void.

In *Jones v. Loree*, 37 Neb., 816, it is said: "Several chattel mortgages made and delivered simultaneously to se-

cure different creditors of the mortgagor, the delivery being to one of the mortgagees, who in the transaction acts for himself and on behalf of all the other mortgagees, do not constitute an assignment for the benefit of creditors." The facts in that case were substantially the same as in the one at bar. The rule there laid down is adverse to the claim made by the plaintiff in error here.

The second contention of the plaintiff in error is that the mortgages are void because they are executed upon property the value of which is greatly in excess of the debts secured. The aggregate of the debts secured by the mortgages was \$8,389.52. The evidence as to the actual value of the property is conflicting. It was valued by the appraisers when seized on the attachment, at \$13,188, and it sold in bulk at public auction for something near \$7,000. In *Jones v. Loree, supra*, IRVINE, C., speaking upon this point and for this court, said: "Upon the first branch of this argument it is sufficient to say that the mortgages to Loree, Mrs. Briggs, and the two Higginses are shown conclusively by the evidence to have been given at one time as part of the same transaction, Loree acting, in taking the mortgages, on his own behalf and as agent for the other mortgagees. For the purpose of considering the proportion existing between the property mortgaged and the debts secured the court instructed the jury that they were to be considered as one transaction. The reason of the rule avoiding, as against creditors, conveyances of property in value greatly in excess of a debt secured by such conveyances is that such a conveyance necessarily operates to hinder and delay, if not to defraud, other creditors; that it evinces an intention upon the part of the debtor to do more than secure the creditor preferred, and practically conclusively proves an intent upon his part to deprive other creditors of their remedies. From the nature of the transaction the creditor preferred is chargeable with notice of such design, and is shown by his act of taking grossly disproportionate

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security to have participated in the fraudulent intent. But when a number of small debts are secured upon property, not disproportionate to the aggregate amount of these debts, no such effect follows and no such intention can be imputed either to grantor or grantees. This court has repeatedly sustained a series of conveyances of this character. Among such cases are *Hershiser v. Higman*, 31 Neb., 531; *Hamilton v. Isaacs*, 34 Neb., 709." And in *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 803, it is said: "The contention of the plaintiff in error seems to be that as the value of the property mortgaged was \$5,925.41, and the debt secured by the first mortgage was only \$2,500, the security was so greatly in excess of the amount of the first mortgage debt as to render the mortgage fraudulent in law, whatever that may mean. But these mortgages were all made and filed on the same day and within a few minutes of each other; in other words, they were one transaction. We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two, or even three, times greater than the debt. Whether it would be, is a question of fact for a jury or trial court and not a question of law." We cannot say that the value of the property mortgaged by Wright & Gregg was so greatly in excess of the debts for which it was pledged as to raise a conclusive presumption of fraud.

Again, it is contended by the plaintiff in error that the mortgages were fraudulent in fact, and so intended by Wright & Gregg. The evidence on which the court below acted was somewhat voluminous. It was conflicting. Some of it was presented by affidavits and some of it appears to have been given by the mouths of witnesses in the presence of the trial court; and unless we can say that the finding of the court is unsupported by competent evidence, we have no authority to disturb it. This has been so often said by the court as to render a citation of authorities superfluous.

The court below heard the witnesses. He observed their manner of testifying, and general demeanor while on the stand. He weighed and scrutinized the testimony, and it does not convince us that Wright & Gregg made these mortgages with any fraudulent purpose; and if it did, the mortgagees would not be affected with such fraudulent intent, unless they participated therein. (*Jones v. Loree, supra.*) The record shows that Wright & Gregg desired to and did prefer the creditors to whom the securities were given; but an intent to defraud cannot be inferred merely from the fact that a preference is given to a certain creditor. (*Jones v. Loree, supra.*) "A debtor has a right to prefer his creditors; to pay part in full to the exclusion of others; and he has a right to secure the debts of a part of his creditors to the exclusion of others; and this is true whether he be insolvent, or in failing circumstances, or not. All the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying, or defrauding his creditors; and whether an act of a debtor in the disposition of his property is fraudulent, is always a question of fact and not a question of law. Section 20, chapter 32, Compiled Statutes, provides: 'The question of fraudulent intent \* \* \* shall be deemed a question of fact and not of law.'" (*Kilpatrick-Koch Dry Goods Co. v. McPheely, supra.*)

But the order of the court discharging this attachment, should be sustained on other grounds, which we shall notice briefly. On May 5 the plaintiff in error made an affidavit for an attachment that Wright & Gregg were indebted to it in the sum of \$6,017 on the notes mentioned above, and on this affidavit an attachment was issued, by virtue of which the sheriff seized the entire stock of goods of Wright & Gregg. The record discloses that the Farwell Company, at that date, did not own or have possession of any one of these notes; that it had previously sold

them for cash and had the money for them at the very time it caused said goods to be attached. The only debt that Wright & Gregg at that time owed plaintiff in error was the balance on account of some \$700, and even this was not included in either the petition, in the suit brought or in the affidavit for attachment under which the goods were seized. The remedy by attachment is a harsh and summary one, a creature of the statute, and before a litigant can invoke it the law requires him not only to give a bond, but to swear to the nature of the claim he has against the defendant, that it is just, and the amount which he ought to recover; and he must own the claim on which he bases his attachment. The seizure of these goods was a wrong, a grievous wrong, and done in utter disregard of all law. To thus use the remedies of the statute is to torture them into engines of oppression. To call this "law" is to mock at justice. The fact that the Farwell Company had guaranteed the payment of these notes gave it no cause of action against Wright & Gregg on them until such time as they were compelled to and did make good their guaranty, which was long after the seizure of the goods under attachment.

The amended affidavit for attachment, filed May 16, by the Farwell Company did not help the case. By this the amount due on the account was attempted to be brought in, but the false claim of indebtedness on the notes was still maintained; and the filing of the amended affidavit for attachment on September 26, in which the Farwell Company attempted to base a claim against Wright & Gregg on these notes, which the Farwell Company had at that time again become the owner of, was an attempt to put into this case a cause of action which the Farwell Company did not own on May 5, when it brought its attachment suit and seized these goods; and as it had no cause of action against Wright & Gregg on these notes at the time it brought its original action, and at the time it sued out

its first attachment, it could not after that put into such suit of attachment any cause of action which it subsequently acquired and assert it against the property seized by virtue of the original writ of attachment.

Again, the attachment writ was levied on goods, and the same were sold subject to the mortgage made by Wright & Gregg to the Kearney National Bank, this mortgage having been purchased, doubtless, by the Farwell Company. This mortgage was made at the same time the others were, and for a like purpose and under like circumstances. We will presume that the attachment writ was levied as directed by the Farwell Company, and the evidence shows that the Farwell Company notified purchasers at the time of the sale of the property under the attachment, that the goods would be sold subject to this Kearney National Bank mortgage, and the Farwell Company is now estopped from claiming that any of these mortgages were fraudulent. (*Kellogg v. Secord*, 42 Mich., 318; *Russell v. Dudley*, 44 Mass., 147.)

We must not be understood from anything contained in this opinion as censuring in any manner the learned counsel for the Farwell Company, as the record shows he acted in the utmost good faith throughout, and on information and instruction from his client, and in ignorance of the true state of facts in the case. There is no error in the judgment of the district court and the same is

**AFFIRMED.**

## JAMES CONWAY V. JOHN ROBERTS.

FILED NOVEMBER 21, 1893. No. 5610.

**Exemptions: RIGHT OF FARMER TO SELECT HORSES.** By the provisions of section 530 of the Code of Civil Procedure a debtor, resident of this state, the head of a family, and engaged in the business of agriculture, is entitled to select and hold as exempt from execution "a pair of horses;" and he may exercise his own discretion in the selection of such horses, and is not limited to any particular horses, but may make such selection from any horses owned by him.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

*Daniel F. Osgood*, for plaintiff in error, cited: *Keybers v. McComber*, 67 Cal., 395; *Kilpatrick v. Callender*, 34 Neb., 727.

*S. P. Davidson, contra*, cited: Code, sec. 530; *Williams v. Golden*, 10 Neb., 434; *Frazier v. Syas*, 10 Neb., 117; *State v. Sanford*, 12 Neb., 430; *Chesney v. Francisco*, 12 Neb., 626; *Desmond v. State*, 15 Neb., 439.

RAGAN, C.

This is an action in replevin brought in the district court of Johnson county by John Roberts against James Conway, a constable of said county. Roberts alleged in his petition that he was a resident of said county; the head of a family; engaged in the business of agriculture; the owner of and entitled to the possession of one two-year-old horse, which had been taken by Conway on an execution against him, Roberts, but that said horse was exempt under the law. Roberts had a verdict and judgment, and Conway comes here on error.

It appears from the record that Johnson was a resident

of said Johnson county, the head of a family, engaged in the business of agriculture, and possessed of no real estate whatsoever, either as a homestead or otherwise; that Conway seized the horse sued for by virtue of an execution against Roberts, who thereupon made inventory under oath of the whole of his, Roberts', personal property, and demanded an appraisement of all such property as was not specifically exempt, in order that he might select his other exemptions. The record does not show that any appraisal was had, but Conway appears to have released all the property levied upon, except the horse in question.

Section 530, Code of Civil Procedure provides: "No property hereinafter mentioned shall be liable to attachment, execution, or sale, on any final process issued from any court in this state, against any person being a resident of this state and the head of a family. \* \* \* Sixth. \* \* \* and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above, one yoke of oxen, or a pair of horses in lieu thereof. \* \* \* All of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk, or legal representative, as the case may be." This law exempted from sale on execution "a pair of horses" and left it to Roberts to choose out of all the horses he owned a pair he desired to retain. Roberts having done this, the officer should have released the horses selected.

Conway requested the trial court to instruct the jury as follows:

"1. The court instructs the jury that the law in exempting a team to a person engaged in the business of farming contemplates a team actually used by him, if he has more than two horses.

"2. The court instructs the jury that a two-year-old colt is not a horse and is not exempt if the person claiming the exemption owns horses four years old and over, which he actually uses in carrying on his business of farming.

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"3. The court instructs the jury that if the plaintiff owned a team which he actually used in carrying on his business of farming, then a two-year-old colt owned by the plaintiff not used in carrying on his business of farming is not specially exempt as a team, under the provisions of our statute."

Conway assigns as error the court's refusal to give these instructions. There was no error in the refusal of the court to so charge. It is not a team that the statute exempts, but "a pair of horses." The statute does not select, or attempt the selection of what particular horses shall be exempt, but leaves that to the execution debtor.

Conway also excepted to and assigns as error the giving of an instruction given by the court as follows: "The jury are instructed that the head of a family, being a resident of this state, and engaged in the business of agriculture, is entitled to hold as exempt a pair of horses specially exempt, in addition to his other exemptions, as provided by law; and this pair of horses said head of a family may select himself." This was correct, and a succinct statement of the law applicable to the facts of the case.

Conway also assigns as error the refusal of the court to permit him to prove the value of certain corn and wheat alleged to belong to Roberts. We are unable to see how this evidence was material in this case. It was not denied that Roberts was the head of a family and a resident of the state, and engaged in the business of agriculture. He selected the horse in controversy as one of the pair exempt to him by law, and whether he owned corn or wheat, or both, and their value, were all immaterial. There is no error in the record and the judgment of the district court is

**AFFIRMED.**

**W. O. RUSSELL ET AL. V. ANDREW A. GILLESPIE.**

FILED NOVEMBER 21, 1893. No. 4662.

**Wrongful Seizure and Sale Under Writ of Attachment:**

**LIABILITY OF SHERIFF: REVIEW.** There being no disputed question of law in this case, and the verdict of the jury being in all respects in accordance with the evidence, the judgment of the district court is affirmed.

**ERROR** from the district court of Red Willow county.  
Tried below before COCHRAN, J.

*W. S. Summers*, for plaintiffs in error.

*J. Byron Jennings*, contra.

RAGAN, C.

This suit was brought in the district court of Red Willow county by Andrew A. Gillespie against W. O. Russell, the sheriff of said county, and V. Franklin and H. Trowbridge, the sureties on said sheriff's official bond. The cause of action alleged is that on May 11th, 1889, said sheriff held an attachment writ sued out before a justice of the peace, in favor of Studebaker & Welch, against one A. W. Gillespie, and that by virtue of said writ said sheriff seized and sold "one bay horse, one set double harness, and one lumber wagon," then and there the property of Andrew A. Gillespie. The answer admitted Russell was the sheriff, Franklin and Trowbridge were his sureties, the seizure and sale of the property, and denied the other allegations of the petition, and alleged that the property so seized was the property of A. W. Gillespie, the defendant in the attachment suit. The one issue in the case, aside from the value of the property, was whether Andrew A. or A. W. Gillespie owned the property seized. The

plaintiff below had a verdict and judgment, and the sheriff and his sureties bring the case here for review.

It appears that Andrew A. Gillespie lived in Colby, Kansas, and A. W. Gillespie was his son living in McCook, Nebraska. Andrew A. Gillespie, at the request of another son of his, John W., also living in McCook, sent the property sued for to John W. Gillespie, at McCook, Nebraska, for him to sell. He rented a barn of one Hart in McCook, put the property in the same and had A. W. Gillespie, his brother, take care of it and try to find a purchaser for it. It appears also that both John W. and A. W. Gillespie did try to find purchasers for their father's property, and offered it at private sale and public auction, and among other persons to whom they offered to sell it was the sheriff. The sheriff says he was led to believe the property seized was A. W. Gillespie's by his having charge of it at the barn. When the sheriff took it he was informed that the property was Andrew A. Gillespie's, and the evidence shows his title to this property to be clear and without a shadow of fraud or suspicion. Indeed, it would seem from the record that the seizure of this man's property was a high-handed outrage. The sheriff knew the day he seized this property that it did not belong to the defendant; yet, in utter disregard of this old man's rights, and in violation of his duties as sheriff, he took a bond from Studebaker & Welch to indemnify him, and committed an act of oppression. The sheriff and his sureties now assign as error that the verdict is contrary to the law and the evidence. It is not contrary to the law or the evidence, but in perfect accord with both.

It is also insisted that the court erred in refusing to give to the jury this instruction: "The court instructs the jury that if you find from the evidence that the plaintiff Andrew A. Gillespie, at the time and prior to the levy of the attachment, under which the property described in the petition was seized and sold, had clothed his son, A. W. Gil-

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lespie, with the possession and apparent ownership of said property, and that said son was at the time, with the knowledge and consent of the plaintiff, holding himself out as the real owner thereof, and that the plaintiff permitted him to manage and deal with said property as his own, and the sheriff acted thereon to his injury, that the plaintiff is estopped to assert his ownership of the property in dispute, and your verdict will be for the defendant." There was no error in refusing this instruction, for the reason that there was no evidence in the case to which it was applicable. The plaintiffs in error in their answer did not plead an estoppel, nor did they prove one. Under the evidence no other verdict than the one for the defendant in error could be sustained. There is no error in the record and the judgment of the district court is

**AFFIRMED.**

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**W. O. RUSSELL ET AL. V. JOHN W. GILLESPIE.**

**FILED NOVEMBER 21, 1893. No. 4660.**

**Wrongful Seizure and Sale Under Writ of Attachment:**

**LIABILITY OF SHERIFF: REVIEW.** There is no question of law involved in this case, and the verdict of the jury being the only one that should have been rendered on the testimony, the judgment is affirmed.

**ERROR** from the district court of Red Willow county.  
**Tried below before COCHRAN, J.**

*W. S. Summers*, for plaintiffs in error.

*J. Byron Jennings*, contra.

RAGAN, C.

This suit was brought in the district court of Red Willow county by John W. Gillespie against William O. Russell, sheriff, V. Franklin and H. Trowbridge, sureties on the sheriff's official bond. The cause of action alleged in the petition is that on the 11th day of May, 1889, the sheriff held a writ of attachment issued by a justice of the peace in favor of Studebaker & Welch and against one A. W. Gillespie, and that under said writ said sheriff seized and sold one brown mare and one black horse, then and there the property of the said John W. Gillespie. The answer admitted the seizure and sale of the property and alleged that it belonged to A. W. Gillespie, the defendant in attachment. John W. Gillespie had a verdict and judgment, and the sheriff and his sureties bring the case here.

The only question litigated below was whether the horses seized belonged to John W. Gillespie or A. W. Gillespie. The evidence was substantially all one way. John W. Gillespie traded an interest in a saloon in Colorado for the horses, and then took or sent them to his father in Colby, Kansas. John W. then located in McCook, Nebraska, and then had these horses brought there. He rented a barn of one Hart in which to keep the horses, and placed his brother, A. W. Gillespie, the defendant in the attachment suit, in charge of them. There is nothing to contradict this evidence. The sheriff was advised when he seized the horses that they belonged to John W. Gillespie and that A. W. Gillespie had no interest in them. The jury could have rightfully found only as they did. The sale of this property by the sheriff was a willful and malicious trespass. There is no error in the record and the judgment of the district court is

**AFFIRMED.**

**ST. JOSEPH & GRAND ISLAND RAILROAD COMPANY V.  
DE WITT W. PALMER.**

**FILED NOVEMBER 22, 1893.    No. 4644.**

- 1. Carriers: INTERSTATE SHIPMENTS: JURISDICTION OF STATE COURTS.** The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject.
- 2. Railroad Companies: COMMON CARRIERS: CONTRACTS TO LIMIT LIABILITY.** A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot in this state by special contract limit or relieve itself from this liability.
- 3. ———: ———: ———: INTERSTATE SHIPMENTS.** The fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule.

**ERROR** from the district court of Adams county. Tried below before GASLIN, J.

The facts are stated in the opinion.

*J. M. Thurston, W. R. Kelly, and E. P. Smith*, for plaintiff in error:

The bill of lading was the written contract of the parties. Parol evidence to prove a prior verbal agreement contradicting its provisions was inadmissible. (*Delaney v. Linder*, 22 Neb., 280; *Goss v. Lord Nugent*, 5 Barn. & A. [Eng.], 64\*; *McNish v. Reynolds*, 95 Pa. St., 483; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 322; *Hamilton v. Thrall*, 7 Neb., 210; *Dodge v. Kiene*, 28 Neb., 216.)

The court erred in submitting to the jury the question of the existence of any other contract for the shipment of the goods than that shown by the written bill of lad-

38	463
47	91
38	463
50	460
50	598
38	463
158	178
58	196
38	463
159	445
88	463
61	510

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ing. (*Taylor v. Fox*, 16 Mo. App., 527; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo., 634; 2 Rorer, Railroads, p. 1319; 3 Wood, Railways, p. 1578, note; Hutchinson, Carriers, pp. 240, 241; *Cincinnati, H. & D. & D. & M. R. Co. v. Pontius*, 19 O. St., 222; *Hopkins v. St. Louis & S. F. R. Co.*, 29 Kan., 388; *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 175; *Norwich Co. v. Wright*, 13 Wall. [U. S.], 113; *Squire v. New York C. R. Co.*, 98 Mass., 239; *Grace v. Adams*, 100 Mass., 505; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y., 1; *Long v. New York C. R. Co.*, 50 N. Y., 77; *Kirkland v. Dinsmore*, 62 N. Y., 171; *Belger v. Dinsmore*, 51 N. Y., 166; *McMillan v. Michigan S. & N. I. R. R. Co.*, 16 Mich., 79.)

The instructions proceed upon the theory that the constitution prohibits a railroad company in this state from limiting its liability to its own line. There was no common law duty in a common carrier to contract to carry beyond its own line. It had the power at common law to make a contract by which it was not to be held liable beyond its own line. The contract alone fixed the measure of its duty beyond its own line. The constitution does not create any new burden not existing in the common law. At common law and in this country a carrier is not a common carrier beyond its own line or chartered line of transportation. Any engagement beyond this must be measured only by the contract it may make in relation thereto. A railroad company may limit its liability as a common carrier to the line of its own road by express contract. (*Detroit & M. R. Co. v. Farmers & Millers Bank of Milwaukee*, 20 Wis., 130; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Jones v. Cincinnati S. & M. R. Co.*, 45 Am. & Eng. R. Cas. [Ala.], 321; *Piedmont Manufacturing Co. v. Columbia & G. R. Co.*, 19 S. Car., 353; 2 Wood, Railways, p. 1572, and note; *Ortt v. Minneapolis & St. L. R. Co.*, 31 N. W. Rep. [Minn.], 519; *Hunter v. Southern P. R. Co.*,

13 S. W. Rep. [Tex.], 190; *Harris v. Grand Trunk R. Co.*, 5 Atl. Rep. [R. I.], 305, and note.)

State interference with the regulation of commerce, interstate in its character, cannot be sustained or upheld. (*Hart v. Pennsylvania R. Co.*, 112 U. S., 331; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S., 557; *Robbins v. Shelby County Taxing District*, 120 U. S., 492; *Leloup v. Port of Mobile*, 127 U. S., 640; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S., 465.)

The court erred in refusing to mark the instruction for special findings requested by defendant either "given" or "refused" before submitting the same to the jury. (Secs. 54, 56, ch. 19, Comp. Stats.; *Tagg v. Miller*, 10 Neb., 443; *Fry v. Tilton*, 11 Neb., 456.)

It was error for the court to receive the general verdict, for the reason that the jury was unable to agree upon the questions submitted for special findings. (Sec. 293, Code; *Doom v. Walker*, 15 Neb., 339.)

*John M. Ragan, contra:*

The bill of lading was not the contract entered into for the shipment of the goods. The contract under which the parties acted was verbal. The rule forbidding the admission of parol evidence to contradict or vary the terms of a written agreement does not apply. The evidence of the parol contract was competent. (*Baker v. Michigan S. & N. I. R. Co.*, 42 Ill., 73; *Mobile & M. R. Co. v. Jurey*, 16 Am. & Eng. R. Cas. [U. S.], 132; *Pereira v. Central P. R. Co.*, 66 Cal., 92; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y., 712; *Strohn v. Detroit & M. R. Co.*, 21 Wis., 554; *Missouri P. R. Co. v. Beeson*, 30 Kan., 298.)

The law of the state in which the contract is made for the transportation of goods must control as to its nature, interpretation, and effect. (*Michigan C. R. Co. v. Boyd*, 91 Ill., 268.)

The company having contracted to carry the goods to

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Grant's Pass, Oregon, and having accepted part of the freight, knowing what the car contained, could not limit its liability to its own line. (*Chicago & N. W. R. Co. v. Monfort*, 60 Ill., 175; *Wilde v. Merchants Dispatch Transportation Co.*, 47 Ia., 247; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; sec. 4, art. 11, Constitution; sec. 111, ch. 16, Comp. Stats., 1887; *Jones v. Voorhees*, 10 O., 145; *Baltimore & O. R. Co. v. Campbell*, 36 O. St., 647; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn., 539; *Dervort v. Loomer*, 21 Conn., 245; *Western Transportation Co. v. Newhall*, 24 Ill., 466; *Union P. R. Co. v. Murston*, 30 Neb., 241; *Illinois C. R. Co. v. Frankenberg*, 54 Ill., 88; *Adams Express Co. v. Stettaners*, 61 Ill., 184; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S., 123; *New York C. R. Co. v. Lockwood*, 84 U. S., 357; *Chicago, R. I. & P. R. Co. v. Conklin*, 32 Kan., 55; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. [U. S.], 262.)

A judgment rendered on a special verdict will not be reversed for a failure to determine one or more of the issues, if the uncontradicted evidence proves that issue in favor of the prevailing party. (*Williams v. Porter*, 41 Wis., 423.)

The special questions submitted must be so material that answers to them would establish the case or the defense, and judgment will not be reversed for the failure of the jury to answer questions where, if answered, the answers could not have affected the result. (*McDermott v. Higby*, 23 Cal., 489; *Sage v. Haines*, 76 Ia., 581; *Louisville & N. R. Co. v. Brice*, 1 S. W. Rep. [Ky], 483; *Osborne v. Pennsylvania R. Co.*, 11 S. W. Rep. [Ky.], 207; *Seekell v. Norman*, 43 N. W. Rep. [Ia.], 190; *Schneider v. Chicago, B. & N. R. Co.*, 43 N. W. Rep. [Minn.], 783; *Direly v. City of Cedar Falls*, 27 Ia., 227; *Greenleaf v. Illinois C. R. Co.*, 29 Ia., 14; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill., 132.)

IRVINE, C.

The plaintiff in error was a railroad company operating a line of railroad between St. Joseph, Missouri, and Grand Island, Nebraska, and passing through the city of Hastings, Nebraska. In December, 1889, certain goods were loaded into a car at Hastings for shipment to Grant's Pass, Oregon. These goods consisted of furniture, wearing apparel, and household goods belonging partly to one Pardee and partly to one Hart, and of a stock of drugs and drug store fixtures belonging to the defendant in error, Palmer. The goods were carried to Grand Island by the plaintiff in error, and there turned over to the Union Pacific Railway Company, on the line of whose road the car was wrecked and no part of the goods was ever delivered at Grant's Pass. Pardee and Hart assigned their claim to Palmer, who brought this suit in the district court of Adams county to recover damages for the loss of the goods.

The petition of the plaintiff below, in addition to the foregoing facts, which are undisputed, pleads, among other things, that Palmer, Pardee, and Hart entered into a verbal contract with the defendant to transport said goods and property to Grant's Pass and there safely deliver them in ten days in consideration of the sum of \$200, and that after the goods were loaded into the car a paper was presented to Pardee for signature, and he signed it, believing it to be a receipt and in ignorance of certain clauses therein contained; that after the goods were turned over to the railroad company for shipment, and the freight of \$200 paid, the railroad company's agent stated to the owners that the \$200 might not be enough to pay the freight and extorted from the owners a promise that in case the freight should exceed \$200, they would pay the excess; that the paper referred to was not the contract of shipment, but that the contract was as first stated, and that the contents and limitations of the paper were fraudulently concealed from the

owners of the goods. The paper referred to was in fact a bill of lading, and the clauses in regard to which fraud was alleged were two: The first was that the railroad company assumed no liability beyond the end of its own line; that is, at Grand Island, Nebraska. The other is as follows: "One car emigrant outfit O. R. Rel'd val. of \$5 per cwt. in case of total loss. S. L. & C."

The answer, so far as it is material, may be analyzed as follows: First—That the railroad was engaged in the business of interstate commerce, and that this was an interstate shipment and not within the jurisdiction of the state courts. Second—That the bill of lading constituted the contract between the parties; that the first provision quoted exempted the defendant beyond the end of its own line, and that there was no fraud or concealment. Further, that the somewhat cabalistic letters and words quoted from the bill of lading meant and were understood to mean owner's risk released to the value of \$5 per cwt. in case of total loss, and that the shippers were to load and count the goods. Third—That the contract between the parties contemplated merely the shipment of an emigrant outfit, which was understood to mean household goods alone, and that the stock of drugs was fraudulently loaded into the car; the established rate on a car containing drugs being very much greater than the established rate on an emigrant outfit. Fourth—That under the interstate commerce law false representations as to the contents of the package, with the consent and connivance of the carrier or its agent, are constituted a misdemeanor and bar the plaintiff from relief.

The evidence upon the part of the plaintiff tends to show that Pardee and Hart went to the agent of the company at Hastings, stating to him that they wished to ship their household goods and stock of drugs, and asked him for the rate to Grant's Pass upon the car load; that the agent informed them that the rate would be \$200, and that there would be nothing to pay at the other end of the

line; that thereupon the goods were loaded upon a car furnished by the railroad company for that purpose; that after the loading was complete, Pardee and Palmer went to the agent for the bill of lading; that the agent then told them that inasmuch as the drugs had been loaded upon the car, he was not sure that \$200 would pay the freight, but that he would mark upon the bill of lading a receipt for the \$200, to apply on the freight, and if there was more to pay it must be paid at the other end; that they consented to this, because there was no other course left open to them; that the bill of lading was then handed to them, and Pardee signed it, none of the owners reading its conditions or having his attention called thereto.

Upon the part of the railroad company the testimony tends to show that at the first interview nothing was said about the stock of drugs, but that when Pardee came for the bill of lading the agent told him that he would not give him a clear bill of lading for he had reason to believe that "there was other stuff in the car besides household goods," but would accept \$200, to be applied, the owners to pay the difference at the other end; that Palmer then handed him \$200, and Pardee signed the bill of lading in duplicate.

The case was submitted to the jury under long instructions, the general effect of which was to submit the question as to whether the oral agreement pleaded or the bill of lading constituted the contract between the parties; further, to instruct the jury that under the laws of this state no limitations upon the liability of a common carrier could be imposed except upon proof that such limitations had been called to the attention of the shipper and by him expressly assented to, and submitting to the jury whether or not attention had been called to the limitations and assent obtained. There was a verdict for the plaintiff in the sum of \$5,461.53.

1. The question of jurisdiction was first raised by de-

murrer to the petition and then by answer. The theory of the railroad company in this regard seems to be that the shipment being from one state to another, it became subject solely to the laws of the United States. If that were so, it would not oust the court of jurisdiction. It would only determine upon what principles of law the rights of the parties would depend. The record shows that an attempt was made to remove the case to the federal court; that the court refused to order the removal. Nevertheless, it would appear that an order of removal must have been obtained from some source, for there is in the record an order of the federal court remanding the case to the district court of Adams county. These proceedings are a part of the law of the case and conclusively determine the question of jurisdiction in favor of the plaintiff.

2. The questions of law in regard to the transaction are discussed in the briefs under a number of heads relating to objections to the evidence and to the instructions of the court. To state each in its order would consume much space, and a detailed consideration is unnecessary, for the reason that all these exceptions and assignments of error relate to a very few main questions. Great stress is laid upon the point that the bill of lading must be treated as the conclusive evidence of the contract between the parties, and that parol evidence was not admissible to show a prior verbal contract contrary to the terms of the bill of lading. In this connection it is also urged very strenuously that the court erred in submitting the question raised by this evidence to the jury. Further, it is urged that the instructions of the court are conflicting; and still further, that the limitations imposed by the bill of lading upon the carrier's liability are, upon principles of common law, valid obligations, and that they must be enforced in the absence of actual misrepresentations or concealment, which it is contended the evidence does not establish. Numerous authorities are cited upon both sides upon these points. A single

consideration disposes of all of these questions. Under the law of Nebraska, whatever the law may be elsewhere, it is beyond the power of a common carrier, by such provisions as appear in the bill of lading, assuming it to be the contract of the parties, to so limit its liability.

In *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117, it is said: "The common law fixed the degree of care and diligence due from railroad companies as common carriers, and a failure to exercise this care and diligence is negligence, without any legal distinction as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is that 'it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty.'" This case arose before the constitution of 1875 went into force. By article 11, section 4, of that constitution, it is provided that "the liability of railroad corporations as common carriers shall never be limited." While the writer might, if the question were a new one, construe this provision as simply a restriction upon the legislature against the limitation of carriers' liabilities by law, and not as preventing such limitation by special contract, the question is no longer an open one and has otherwise been determined. In *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222, by contract the railroad company sought to relieve itself from liability for injury to live stock unless notice in writing were given before the removal of the stock from its place of delivery. This provision of the constitution was there considered and discussed. The court, speaking through Judge COBB, says: "So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to was to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreements with shippers, and thus remove

from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefor. (See *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117, a case which arose under the old constitution, but heard in this court under the new.)” In addition to this constitutional provision, section 111 of chapter 16, Compiled Statutes, provides that “any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers.” This is a portion of the general incorporation act under which the plaintiff in error derives its existence as a corporation. Compiled Statutes, chapter 72, article 1, section 5, provides: “No notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him, or them, in express terms, before such limitation shall take effect.” This section was discussed by the court in *Union P. R. Co. v. Marston*, 30 Neb., 241, and held to apply to just such a case as this, where the limitation was contained in a bill of lading which the shipper alleged was given after the making of an oral contract for shipment. Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of this state is settled that a common carrier cannot, even by the terms of an express contract, relieve itself of its common law liability.

It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivered the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and

if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank; in the other the language was: "Received of Palmer & Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point." Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Oregon. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only twenty-four miles from Grand Island, where the car was delivered to the Union Pacific; and the \$200 received by the railroad company, if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier.

3. The plaintiff in error seeks to avoid the effect of these constitutional and statutory enactments and judicial construction by pleading and arguing the effect of the act of congress known as the "interstate commerce law" and amendments thereto. The particular provision relied upon is from the act of 1889, as follows: "Any person, or any officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classi-

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fication, false weighing, false representations of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or servant, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district within which such offense was committed, be subject, for each offense, to a fine of not exceeding \$5,000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court."

Conceding that the construction of such acts into misdemeanors should render the contract contrary to public policy to such an extent as to deprive the shipper of his remedy against the carrier, the evidence wholly fails to make out a case within the section quoted. Whatever false billing there may have been was by the company itself, as all the evidence shows that the agent knew before the car was moved after loading that it contained articles other than household goods. Under the most favorable construction of the evidence on behalf of the railroad company, if there was any false representation as to the contents of the "package," its true contents were known before the railroad company took charge of the car, and an agreement was made for the payment of any additional freight by reason of the introduction of drugs into the car. We cannot see, therefore, how this section, conceding it to have the effect claimed for it by plaintiff in error, could affect the right of recovery. To give it such effect would be to declare that the section quoted absolutely protects a railroad company from liability in any case where the shipper uses general terms in describing the goods to the carrier or agent, and the agent paraphrases such language into a technical phrase and such phrase does not correctly

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describe the goods, or where the carrier's agent, of his own volition, makes false statements of the character of the shipment. The section referred to was chiefly designed as a restriction upon the carrier. Its whole aim was to prevent false billing or false representations in order to conceal discriminations in favor of particular shippers. It was not intended, and should not be construed, as a means of relieving a carrier from liability because its own agents have committed an error.

But it is argued that upon general grounds the whole subject-matter of interstate transportation was by the constitution placed within the power of congress, and that congress, having enacted the interstate commerce act, assumed such jurisdiction and thereby nullified existing state laws; that not only the acts of congress must be treated upon these subjects as the supreme law of the land, but that the decisions of the federal courts must be accepted as the final statements of the law, prevailing against state statutes and state decisions. Without discussing the question as to whether the federal decisions are opposed to the constitutional and statutory provisions of this state referred to, it is sufficient to say that we cannot accept the theory of the railroad company as above outlined. It is admitted in the pleadings that the company is a corporation organized under the laws of the state of Nebraska. The time of its organization does not appear, but the statutory provisions date from the very earliest period of the state's history. One statute quoted above is a portion of the general incorporation act relating to railroads, the act under which this company derives its right to exist. To say that an act of congress, especially one not in express terms contrary to these provisions, shall be given the effect of nullifying them would be to say that this state must cease to exercise its sovereign power of creating corporations for railroad purposes, else it must content itself with creating such corporations absolutely untrammelled by con-

ditions, or permit them to exist subject only to such conditions as the congress of the United States may see fit to impose. While this state forms a constituent part of the Union under its present constitution, this court should never yield its consent to such a doctrine. If such be the law, it must be declared by another tribunal; and in case it should be so declared, the exercise by the state of its sovereign power of creating such corporations should, from every motive of self-preservation, cease.

4. In addition to the general verdict rendered by the jury there was an attempt to have certain special findings returned. One of the errors assigned is the refusal of the court to mark upon the margin of the submission of those findings the word "given." If the submission of these findings amounted to an instruction the objection would be purely technical, and the refusal of the court to use the word "given" could not operate to the prejudice of the plaintiff in error. Instead of marking the submission given, the court made a note as follows: "As I have said in the attached submission, I submit these special findings for you to pass upon; and, in the opinion of this court, it would be the grossest kind of error to attempt to control your discretion in passing on these special findings." There also appears to have been indorsed upon the questions submitted a quotation of that portion of the statutes whereby it is permitted to the jury in its discretion to return a general or special verdict. Of the special questions submitted the first related to the value of the goods at Hastings and was answered. The second related to the value of the goods at Grant's Pass, Oregon, at the time when they should have been received there. In answer to this the jury stated: "We do not know." The other questions related to the freight rates under different circumstances. All these questions were answered: "We do not know." By the instructions the jury was told that if it should find for the plaintiff, the verdict should be for the market value

of the goods at Grant's Pass at the time they should have been there delivered, together with interest. The second question submitted was material to the case. The others were entirely immaterial, and the discharge of the jury without answering them was in no way prejudicial. It is urged, however, that when the jury answered that they did not know the market value of the goods at Grant's Pass, it, in effect, stated that it was unable to fix the measure of damages and that the general verdict could not, therefore, have been founded on the evidence and in obedience to the instructions. But under the evidence given as to the value of the goods at Grant's Pass, no verdict less than that returned could be sustained. There is evidence tending to show that the value of the goods at Hastings was less than the value marked upon an inventory offered in evidence, and one witness testified that the goods were worth no more at San Francisco than at Hastings, but there is nothing to show that he even had any knowledge of the value at San Francisco. The only competent evidence of the value of the goods at Grant's Pass, Oregon, fixes it at more than \$7,000; so that the verdict rendered could not have been affected by any findings based upon the evidence in answer to the special question submitted.

Some of the instructions do not state the law correctly. Some of them are apparently conflicting, but in any view of the evidence, for the reasons already stated, no verdict different in character or less in amount could be sustained. The judgment is therefore

AFFIRMED.

RAGAN, C., took no part in the consideration or decision of this case.

**LIND NELSON V. COLONEL J. HIATT.**

FILED NOVEMBER 23, 1893. No. 5224.

**Good-Will: SALE: BREACH OF CONTRACT: DAMAGES.** A party sold his business and the good-will of the same to another, and agreed not to do a general business at that point. He violated his agreement, and engaged in business at the place named. The matter was then submitted to arbitration, and an award made assessing damages and restraining the vendor from again doing business at that place. Afterwards he carried on business at the place named. *Held*, That the purchaser was entitled to compensation for a violation of the agreement, and the damages could not be considered excessive.

**ERROR** from the district court of Gage county. Tried below before BROADY, J.

*Griggs, Rinaker & Bibb*, for plaintiff in error, cited: *Holmes v. Boydston*, 1 Neb., 346; *French v. Range*, 2 Neb., 254; *Sycamore Co. v. Sturm*, 13 Neb., 215; *Bridges v. Lanham*, 14 Neb., 369; *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572.

*Hardy & Wasson, contra.*

**MAXWELL, C. J.**

This is an action for a breach of the following agreement:

“This agreement, entered into this 22d day of August, 1889, by and between Lind Nelson and C. J. Hiatt, witnesseth: That the said Lind Nelson, for and in consideration of the covenants to be performed by C. J. Hiatt, do promise and agree not to buy hogs or cattle to ship from this place of Odell, Gage county, Nebraska, except said Lind Nelson has a part of car load of cattle to ship, then said Nelson has the privilege to buy to fill said car and ship the same. This agreement to be in force so long as

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C. J. Hiatt is in the business of buying and shipping from Odell, and no longer.

LIND NELSON.

"C. J. HIATT.

"Witness: MAT BROOKS."

The price paid by Hiatt seems to have been \$1,000. Lind seems to have continued to purchase stock in violation of the agreement, and the parties submitted the matter to arbitration, the award being as follows:

"BEATRICE, NEB., June 11, 1890.

"We, the undersigned arbitrators in the case of *C. J. Hiatt v. Lind Nelson*, find:

"1. That above named defendant shall pay all court costs and the costs of this arbitration.

"2. That said defendant Lind Nelson shall pay the sum of \$125 to the plaintiff C. J. Hiatt, as damages in full to date.

"3. That the defendant Lind Nelson shall hereafter abstain from engaging, either directly or indirectly, in the business of buying and shipping hogs or cattle at the village of Odell, Gage county, Nebraska, in accordance with the articles of agreement entered into on the 22d day of August, 1889, by and between above named plaintiff and defendant.

"In witness whereof, we have hereunto set our hands this 11th day of June, 1890.

L. E. WALKER,

"G. L. COLE,

"E. C. SALISBURY,

"*Arbitrators.*"

After this award was made the plaintiff continued to purchase stock in violation of his agreement, and this action was brought to recover for the damages.

In his answer to the petition the defendant below, Lind Nelson, alleges:

"1. That he admits that on August 22d, 1889, he entered into the written agreement with plaintiff set forth in plaintiff's petition as Exhibit 'A.'

"2. That there was no consideration for the said contract; that the property sold by defendant to plaintiff was well worth the sum paid by plaintiff to defendant at said time.

"3. That prior to and ever since the 11th day of June, 1890, the said plaintiff quit and ceased the business of buying and shipping of cattle and hogs from Odell, Gage county, Nebraska.

"4. That he denies each and every allegation in the first cause of action in said plaintiff's petition contained not herein expressly admitted or denied."

The second cause of action was withdrawn from the jury and need not be considered.

The principal errors relied upon are that the damages are excessive, and that the verdict is not sustained by sufficient evidence. These are considered together in the plaintiff in error's brief and will be so considered here.

Hiatt testified as a witness in his own behalf as follows:

Q. Are you the party that made the contract, Exhibit A, attached to the petition, with Mr. Nelson?

A. Yes, sir.

Q. You may now state what you purchased of Mr. Nelson under that contract, and what you paid for it.

A. I purchased his shipping yard and scales, and there was an old corn-crib in the yard and a shanty for a kind of office he had there, he had been using it for a hog pen part of the time, and the good-will of the business.

Q. What did he say to you in regard to the value of his business?

A. He said his business was worth \$100 a month. He said the reason he wanted to sell——.

Q. (By Mr. Bibb.) Was there any written contract of sale between you—any written bill of sale?

A. Yes, he gave me a deed to the land.

Q. This contract was in writing, then?

A. Yes.

Q. How much did you pay him, by the way?

A. I paid him the sum of \$1,000.

Q. When did you take possession of the property?

A. Some time in August, 1889.

Q. How long after you made the contract?

A. The next day.

Q. Then what did you do there?

A. Well, I was living on the farm at the time.

Q. You may state whether or not you continued in business there up to the time you commenced the first action in the case of *Hiatt v. Nelson*. What business were you engaged in?

A. I was shipping from Odell.

Q. Shipping what?

A. Cattle and hogs.

Q. How did you get them to ship?

A. I bought them of farmers.

Q. Now, skip down to the 11th of June, 1890. What occurred about the 11th of June, 1890, after the commencement of the suit?

A. I got word that our suit was set for a certain day, and Nelson came to me and wanted to settle before we came up. I asked him how he wanted to settle, and he said he wanted to leave it to arbitrators; and I asked him who he wanted to pick for as arbitrators, and he said we would take three men out of the Masonic lodge at Odell. I objected to it. I told him I didn't want to mix any of our members up in the business, but was willing to go to Beatrice and pick men within the lodge there, and we agreed to it and came.

Q. What was done after you got here?

A. Well, we chose arbitrators.

Q. Do you know who they were?

A. L. E. Walker, G. L. Cole, and a Mr. Steele—I forgot his first name. Any way, he couldn't serve, and we chose Mr. Salisbury in his place.

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Q. Was there any written obligation made before this was arbitrated?

A. Yes.

Q. On the 11th day of June, 1890, what business were you engaged in?

A. Engaged in the shipping business,—live stock, from Odell, Nebraska.

Q. How long had you been engaged in the business prior to that time at that place?

A. Since August.

Q. At the time of making that contract?

A. Yes, sir.

Q. State what year it was that you made the contract to commence business.

A. In the year 1889.

Q. And the 11th of June you were engaged in the same business up to January first?

A. Yes.

Q. Go on and tell the court how you were engaged in business, and what you were doing from that time up to January, 1891.

A. I was shipping hogs and cattle from Odell to market.

Q. Where did you get them to ship?

A. I bought them from farmers in that county.

Q. State to what extent you were engaged in it.

A. I was engaged in it all the while. I put in all my time to that business, and have ever since I bought the business.

Q. What was defendant Nelson doing from the 11th of June, 1890, up to the 17th of January, 1891?

A. He was engaged in the same kind of business.

Q. Where?

A. At Odell.

Q. In this county?

A. Yes.

Q. Where did he get his stock to ship?

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A. Well, he got part of them from the same men that I got mine of, and different farmers around.

Q. How did he get them of the farmers?

A. I suppose he bought them.

Q. Now, he during this time was carrying on business there in competition with you?

A. Yes, he was.

Q. Tell how that affected you in regard to your buying. Go on and tell the jury.

A. Whenever he got a chance to overbid me on anything he would go and buy it regardless of the market. If I had bid on a bunch of stock all the market would afford, if the same men gave him a chance to bid he would go and buy it, to keep me from buying it, regardless of the market.

Q. State whether or not he compelled you to bid for stock more than it was worth. How did that affect your buying?

A. It caused me to have to pay more for stock than I could afford to and ship them to get my money back. It caused me to lose money in buying.

Q. How has his buying there in competition with you affected your business and trade?

A. Well, it has taken off the profit of the business. He caused me to ship a good many less stock than I would if he hadn't been in the business.

Q. How has what you had to pay for stock there,—has it been increased?

Q. You may state how in particular circumstances or cases that you know of, where he has bought stock from under you and caused you to bid more for it than it was worth?

A. There has been quite a number of cases, and I believe it was the 5th of November I went out and bought a car load of hogs, and he came along behind me and went to every man I bought of and offered them ten cents more a hundred than I bid for them, and told the men they were

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worth that to ship. When they came in with the hogs they wanted me to give the rise on the market, and I told them I bid all I could afford to pay and ship them, and I showed them the market, and I don't think there was a man but was satisfied to let me have the hogs, except one man, Payne, who told me if he could not get any more when he brought them in he would let me have them. Nelson paid him sixty cents, and I bid \$3.50. That was the only load of hogs he got out of the car load I bought.

Q. Where did he keep himself; where did he stay during this time?

A. He staid on the street and riding around the country.

Q. What was he doing there?

A. Bidding on stock and buying and shipping.

Q. To what extent did he buy and ship?

A. I don't know just how many car loads he bought and shipped. He was shipping right along,—he and Raney. He had a partner, and one would go one way and the other the other.

Q. How has it affected the business there at Odell as regards the business being profitable or not?

A. Well it has affected it so there has been no money in it to me.

Q. Now you are acquainted with the extent of that business at Odell, buying and shipping hogs that come in at that point, are you?

A. Yes, sir.

Q. You say at the time you made the contract and bought him out he told you how much the business was worth per month?

A. He told me there was about \$100 a month in the business.

Q. How much have you been damaged for the seven months from June 11, 1890, to January 17, 1891, by reason of his buying and shipping hogs at Odell in competition with you?

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Q. How much under ordinary circumstances, were not Mr. Nelson purchasing and shipping hogs and cattle from Odell, would the business have been worth from that particular month, from the 11th day of June to the 17th of January?

A. I think it would have been worth \$100 a month to me if he hadn't been buying against me.

The material facts above set forth are not denied. The testimony thus proves, without contradiction, that the plaintiff in error, having sold his business and the good-will thereof to the defendant in error, with an agreement not to do business at that point, deliberately violated his agreement.

In *Carey v. Gunnison*, 17 N. W. Rep., 885, the supreme court of Iowa thus speaks of good-will: "The good-will connected with the establishment of any particular trade or occupation may be the subject of barter and sale. It is a valuable right, and if it be unlawfully destroyed or taken away, the law will award compensation to the injured party. It is defined to be 'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill, affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudice.' (Bouv., Law Dict.; Story, Partn., sec. 99.) We do not understand that counsel for defendant claims that what may be properly called 'good-will' is not the subject of contract, and that one acquiring it may not maintain an action for its deprivation. But he insists that that for which defendant seeks to recover in this action is not properly good-will, but rather profits of trade. The distinction between the two is obvious. Profits are the gains realized from trade; good-will is that which brings

trade. A favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term 'good-will.' What the trader gains from the trade so acquired are profits. If by any means customers are driven from a particular locality to which they resort for trade, it is plain that the trade loses that which we have described as good-will."

In *Churton v. Douglas*, Johns. Eng. Ch., 174, it is said: "It was argued that in *Shackle v. Baker*, 14 Vesey, 468, *Cruttwell v. Lye*, 17 Vesey, 335, and *Kennedy v. Lee*, 3 Mer., 452, Lord Eldon has laid down the principle that an assignment of the 'good-will' of a trade, *simpliciter* carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises. But it would be taking too narrow a view of what is there laid down by Lord Eldon to say that it is confined to that. 'Good-will,' I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. When Lord Eldon, in speaking of a nursery garden or a locality which the customers must frequent to look at the plants or other things, and when Sir Thomas Plumer, in another case, in speaking of a retail shop which a person must enter in order to buy the goods there exposed, they are only, as it appears to me, giving those as illustrations of what good-will is. But it would be absurd to say that where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in

Fleet street, or in the Strand or any place adjoining, and that they regard that and do not regard the identity of the house of business, namely, the firm."

In *Sheppard v. Boggs*, 9 Neb., 257, and *Wallingford v. Burr*, 17 Neb., 137, this court held that the good-will of a business was an element of value which was the subject of sale in connection with the sale of the business. In the case at bar the plaintiff in error sold his business with the good-will to the defendant in error for \$1,000, and was paid the consideration. One provision of the agreement was that he was not to do business at that point. He also reported that the business was worth \$100 per month. He engaged in business again at Odell, in violation of his contract, and evidently sought to break up the business of the defendant in error. Thus, after a number of farmers had sold their hogs to the defendant in error for as high a price as the market would bear, the plaintiff in error came in and offered the sellers a greater price. The evident object was to create dissatisfaction and injure the defendant in error's business. The plaintiff in error complains that he made no money in the purchase of stock during this time. This merely corroborates the testimony of plaintiff below, that he was paying all that the market would bear, and that the defendant in error frequently offered more. The latter was clearly in the wrong. He not only violated his agreement, but the award of the arbitrators, and we cannot say that the damages are excessive. They do not amount to \$50 per month. The plaintiff in error should do business at some other point, or else repurchase the business from the defendant in error. Honesty and fair dealing require him to adhere to his contract. Upon the whole case there is no material error in the record, and the judgment is

**AFFIRMED.**

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41 617UNION STOCK YARDS COMPANY OF OMAHA V. CHARLES  
M. CONOYER, ADMINISTRATOR.

FILED NOVEMBER 28, 1893. No. 5417.

1. **Negligence: DEFECTIVE APPLIANCES: NOTICE: PLEADING.**

Where an action is brought by an administrator against a stock yards company for the death of a switchman, caused by defects in the railway track, it is unnecessary to allege in the petition that he had no knowledge of these defects. That is a matter of defense which, to admit proof, must be pleaded.

2. **Admission of Evidence.** There was no error in the admission of evidence.3. **Motion to Direct Verdict for Defendant: EVIDENCE.**

Where at the close of the testimony of the plaintiff a motion is made by the defendant to instruct the jury to return a verdict for the defendant, every fact alleged in the petition which there was testimony tending to prove will, for the purpose of the motion, be considered as proved; and if the testimony as a whole shows a liability of the defendant to the plaintiff the motion should be overruled.

4. **Instructions.** No error in giving or refusing instructions.

**ERROR** from the district court of Douglas county. Tried below before KEYSOR, J.

The opinion contains a statement of the case.

*Breckenridge, Breckenridge & Crofoot*, for plaintiff in error:

A petition in an action to recover for personal injuries, where the person injured sustains the legal relation of a servant to the person sought to be charged, must show that plaintiff or the injured person did not know, or had no reasonable means of knowledge, and that the defendant did know, or should have known, of the danger or defect causing the injury. (*Bogenschutz v. Smith*, 1 S. W. Rep. [Ky.], 578, 3 S. W. Rep., 800; *Louisville N. A. & C. R. Co. v.*

## Union Stock Yards Co. v. Conoyer.

*Sanford*, 19 N. E. Rep. [Ind.], 770; *Louisville N. A. & C. R. Co. v. Corps*, 24 N. E. Rep. [Ind.], 1046; *Philadelphia & R. R. Co. v. Hughes*, 13 Atl. Rep. [Pa.], 288; *Norfolk & W. R. Co. v. Jackson's Admr.*, 8 S. E. Rep. [Va.], 370; (*Minty v. Union P. R. Co.*, 21 Pac. Rep. [Idaho], 663; *Mad River & L. E. R. Co. v. Barber*, 5 O. St., 541; *Buzzell v. Laconia Mfg. Co.*, 48 Me., 113; *Hayden v. Smithville Mfg. Co.*, 29 Conn., 548; *International & G. N. R. Co. v. Doyle*, 49 Tex., 190; Beach, Contributory Negligence, sec. 123; Wood, Master and Servant, sec. 414; 2 Thompson, Negligence, p. 1052; Black, Proof and Pleading in Accident Cases, secs. 18, 21.)

*Mahoney, Minahan & Smyth, contra:*

It is unnecessary for the servant to plead and prove want of knowledge of the defect. (*Mayes v. Chicago, R. I. & P. R. Co.*, 63 Ia., 562; *Wells v. Burlington, C. R. & N. R. Co.*, 56 Ia., 520; *Hulehan v. Green Bay, W. & St. P. R. Co.*, 58 Wis., 319, 68 Wis., 520; *Dorsey v. Phillips & Colby Construction Co.*, 42 Wis., 583; *Cummings v. Collins*, 61 Mo., 520; *Dale v. St. Louis, K. C. & N. R. Co.*, 63 Mo., 455; *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo., 195; *Colbert v. Rankin*, 72 Cal., 197; *Sanborn v. Madera Flume & Trading Co.*, 70 Cal., 261; *Snow v. Housatonic R. Co.*, 8 Allen [Mass.], 441; *Missouri P. R. Co. v. Lee*, 7 S. W. Rep. [Tex.], 857; *Pidcock v. Union P. R. Co.*, 1 L. R. A. [Utah], 131; *Shanny v. Androscoggin Mills*, 66 Me., 420; *Unotilla v. Duluth Lumber Co.*, 33 N. W. Rep. [Minn.], 551; *Smith v. Peninsular Car Works*, 27 N. W. Rep. [Mich.], 662; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Stevens v. Howe*, 28 Neb., 547; *Village of Orleans v. Perry*, 24 Neb., 831.)

MAXWELL, C. J.

This is an action brought by the defendant in error against the plaintiff in error to recover for the death of

W. J. McAnnelly, caused, it is alleged, by the negligence of the plaintiff in error. On the trial of the cause the jury returned a verdict for \$5,000 in favor of the defendant in error and made special findings as follows:

"The jury are directed to make the special findings in answer to the following interrogatives:

"1. What was the condition of the track at the point where the forward trucks of the next to the last car in the train left the rails?

"A. Covered by coal and cinders and other rubbish.

"2. Did the defendant know the condition of the track as it was on the morning of the accident?

"A. Not known.

"3. Did Mr. McAnnelly have knowledge, or means of knowledge, of the condition of things at the place where the accident occurred?

"A. Not known.

"4. What caused the forward trucks of the car next to the last one to jump the rails?

"A. Cinders and coal.

"5. Was or was not the death of Mr. McAnnelly accidental?

"A. It was not accidental.

"6. How did Mr. McAnnelly come to be thrown under the cars?

"A. It was caused by the jar received from the trucks leaving the rails.

"7. What caused the death of Mr. McAnnelly?

"A. He was crushed beneath the cars."

A motion for a new trial was overruled and judgment entered on the verdict.

1. The principal ground of the action is that the death was caused by the defective condition of the track, and it is objected by plaintiff in error that there is no allegation in the petition that the deceased "did not know, or had any means of knowledge, of the defective condition of the

track complained of." These facts are a matter of defense and need not be alleged or proved in the first instance. This question was before the supreme court of Iowa in *Mayes v. Chicago, R. I. & P. R. Co.*, 14 N. W. Rep., 342 and *Wells v. Burlington, C. R. & N. R. Co.*, 9 N. W. Rep., 364, and it was held to be a matter of defense, and unless pleaded by the defendant, proof could not be given on that point. There are many other cases sustaining the decisions of the Iowa court, but it is unnecessary to burden this opinion with them. Substantially the same rule was adopted by this court in *City of Lincoln v. Walker*, 18 Neb., 244, and other cases since decided. The first objection is untenable.

2. A number of objections are made to the introduction of evidence. It is unnecessary to review these at length. No material error has been pointed out, and no material error in that regard was committed by the court.

3. At the close of the testimony of the plaintiff below, defendant below asked the court to instruct the jury to return a verdict in its favor. This the court refused to do, to which the defendant below excepted and now assigns the ruling of the court for error. The record shows that there was testimony tending to sustain every proposition in the petition. Where this is the case, and a motion is made to direct a verdict, the rule is that every point which the evidence tends to prove, for the purposes of the motion, must be considered as established. Such a motion can only be sustained where there is a failure to prove some material fact in the case by reason of which no liability of the defendant to the plaintiff is shown. The motion, therefore, was properly overruled.

4. Errors are assigned in giving various instructions, and also in refusing to give several instructions asked by the defendant below. It is unnecessary to review these at length. The instructions given seem to be applicable to the testimony, and those asked were properly refused.

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Union Stock Yards Co. v. Larson.

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There is no material error in the record and the judgment is

AFFIRMED.

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UNION STOCK YARDS COMPANY OF OMAHA V. ALBERT  
P. LARSON.

FILED NOVEMBER 28, 1893. No. 5460.

**Master and Servant: DEFECTIVE APPLIANCES: PERSONAL INJURIES: EVIDENCE: REVIEW.** In an action for personal injuries, the only question being the sufficiency of the testimony to sustain the verdict, and the testimony being ample on every material point, the verdict will not be set aside.

ERROR from the district court of Douglas county.  
Tried below before KEYSOR, J.

*Charles J. Greene and Breckenridge, Breckenridge & Orofoot, for plaintiff in error.*

*Cowin & McHugh, contra.*

MAXWELL, C. J.

This is an action for personal injuries sustained by the defendant in error by reason of the alleged negligence of the plaintiff in error. The injury is stated in the petition as follows:

“That he went into the employ of the defendant company in the year 1888 as a railroad switchman in and about the yards of the said defendant company and its tracks in and about South Omaha, and remained in the employ of the company until the 22d day of November, 1889, as such switchman. At the latter date, and for some time before, he was receiving wages from the defendant company as such switchman, to the amount of from \$3.15

to \$3.50 per day. Among other duties devolving upon the plaintiff as such switchman was the coupling and uncoupling of cars, car to and from car, and car to and from engine. It was the duty of the company in this behalf to furnish suitable cars, engines, and appliances, whereby and wherewith the plaintiff was required to do and perform said services. On the 22d day of November, 1889, the plaintiff, in the performance of his duty for the defendant, was called and required to uncouple a car from one of the engines of said defendant company, and while attempting to perform the said service his left hand was caught between the top lip of the draw-bar of the engine and the head-pin in the draw-bar on the car, and bruised and crushed the same so that he lost one finger, the second finger, and substantially the use of his left hand, which loss of use of hand is permanent, so that by reason of said injury the plaintiff is permanently disabled to a great extent to perform manual labor; that he suffered by reason of said injury great pain, mental and physical, and that up to the present time he is rendered wholly unable to perform any labor, and that his services were reasonably worth the sum of from \$3.15 to \$3.50 per day; that he has always performed manual labor for support and is not qualified in any other department to earn a livelihood. He has incurred large expense in connection with said sickness by incurring doctor bills to the amount of \$100; that the said injury was caused wholly by the negligence of the said defendant company, in this: that the draw-head of the engine and the draw-head of the car that were coupled, and which the plaintiff attempted to uncouple, were worn out and defective and unfit for use, and had been so worn out and unfit for service for three months before the injury complained of, and were unfit for use and should have been removed and new ones placed in their stead; and by reason of being thus worn out and defective, the top lip of the draw-head of the engine, when slack was made for

uncoupling, reached back to the pin which had to be removed to make the uncoupling, while, if the said draw-heads had been in reasonably good condition, the draw-head of the engine would not, when slack was made, reach within an inch or an inch and one-half of the coupling pin when in place; and it was by reason of the fact of the draw-head extending back to the coupling pin and coming in contact with it that the said injury resulted. The defects were that the heads of the draw-heads were so worn out and defective as to cause the contact aforesaid, which would not have occurred had they been in reasonable and proper condition; that he did not know of the said defects until immediately after the injury aforesaid, but that before the injury the defendant company did know of such defects, but carelessly and negligently continued to use said appliances; that his injuries as aforesaid were caused wholly by the negligence and carelessness of the said company defendant; and that he, the plaintiff, was free from any and all carelessness, negligence, or blame in the premises."

To the petition the defendant below, after denying certain facts, answered as follows: "For its further answer to plaintiff's petition this defendant states: That the plaintiff was, at or about the time stated, an employe of this defendant and was a switchman in its yards in the city of South Omaha, Nebraska; that if said plaintiff received any injuries of any kind whatsoever while in the employ of this defendant, such injuries were received by and through the carelessness and negligence of the plaintiff and not because of any negligence or carelessness of this defendant. This defendant denies specifically that the draw-bar of the engine mentioned in his petition was defective and worn as therein alleged, and also denies that the draw-bar of the car referred to in plaintiff's petition was defective and worn as therein alleged, but states that the same, and particularly the draw-bar of the engine of the defendant, were in good

condition. That the employment of the plaintiff was in itself of a dangerous character, and the plaintiff was fully aware of the dangers incident thereto."

The reply is a general denial. On the trial of the cause the jury returned a verdict for the defendant in error for the sum of \$3,900, upon which judgment was rendered.

The sole question presented is the sufficiency of the evidence to sustain the verdict. One Anthony Donohue was called as a witness on behalf of the defendant in error and testifies as follows:

Q. Did you know the character, the nature and conditions, of the front draw-head of engine No. 1?

A. Yes, sir; I did.

Q. At the time that Mr. Larson was hurt?

A. Yes, sir.

Q. You may state what the condition of that draw-head was.

A. It was worn out from working towards the hill. It was worn so that the draw-bar extended out far enough for the pin to——

Q. How long had it been in that condition?

A. I can't say how long. My attention was called to it two or three weeks before this man Larson was hurt.

Q. By whom?

A. F. E. Norris.

Q. Under what circumstances?

A. He got his glove caught when he was drawing the pin, but it didn't happen to catch his hand.

Q. Were you close by there?

A. I was sitting out about fifteen or twenty feet, where my office was nights.

Q. After he called your attention to it did you examine the draw-head?

A. Was there. I went out and looked at it.

Q. Who looked at it with you?

A. Well, there was this man Norris and one or two others.

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State v. Walton.

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Q. Did you, Mr. Donohue, say anything to Mr. Shropshire about this?

A. Yes, sir.

Q. When was that?

A. About two or three——

Q. No, with respect to Norris?

A. The next morning.

Q. What did you say to Shropshire about the draw-bar on No. 1?

A. I told him it would take the hand off of some one. I don't know just what I told him, but told him about the draw-bar being worn out and would catch somebody.

Donohue was the foreman of the night force in the yards, and he testifies that he informed Shropshire, the overseer of the yards, of the defective draw-head, and he is amply corroborated. So upon every other point in the case. It was one proper to submit to a jury, and the finding is supported by ample evidence. There is no material error in the record and the judgment is

**AFFIRMED.**

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**STATE OF NEBRASKA, EX REL. VICTOR H. COFFMAN,  
V. W. C. WALTON, JUDGE, ET AL.**

**FILED NOVEMBER 28, 1893. No. 6541.**

**Bill of Exceptions: MANDAMUS TO REQUIRE SIGNATURE OF JUDGE: LACHES.** A negotiable promissory note secured by a mortgage on real estate was made and delivered by one W. to C. C. duly indorsed the note and delivered the same to F., who thereafter brought an action of foreclosure, and obtained a decree finding the amount due on the note and mortgage, and that W. and C. were liable for any deficiency after the sale of the mortgaged premises. The decree was rendered April 18, 1892,

to which no objection was made, and the judgment for deficiency rendered June 26, 1893, whereupon it is sought to compel the judge before whom the case was tried, or his successor, to sign a bill of exceptions of the evidence introduced on the trial of the foreclosure suit to show that no evidence was introduced except the note and mortgage. *Held*, That the application came too late.

ORIGINAL application for *mandamus* to compel the respondents to sign a bill of exceptions. *Writ denied*.

*John O. Yeiser*, for relator, cited: *Cobb v. Thornton*, 8 How. Pr. [N. Y.], 66; *Bank of Rochester v. Emerson*, 10 Paige [N. Y.], 115; *Davidson v. Myers*, 24 Md., 538.

MAXWELL, C. J.

This is an application for a writ of *mandamus* to compel the defendants to sign a bill of exceptions. It is alleged, in substance, in the petition, that on the — day of October, 1891, Charles F. Fohs filed his petition in the district court of Douglas county against Charles W. White, Victor H. Coffman, *et al.*, the object of which was to foreclose a mortgage on certain real estate therein described; that on the 18th day of April, 1892, a decree of foreclosure and sale was duly rendered in said cause for the sum of \$2,822.23, of which no complaint is now made; that the mortgaged property was sold, to which no objection is made; but after the sale of such property, to-wit, on the 26th day of June, 1893, a judgment for deficiency was duly entered against Coffman, and it was then sought to have the defendants sign a bill of exceptions in the original decree rendered April 18, 1892. A statement of the case will show that no authority exists for the preparation and signing of said bill after so great a lapse of time, and the defendants properly refused to sign the same. The case is somewhat similar to that of *Stover v. Tompkins*, 34 Neb., 465, but the question as to the effect of the original decree

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Work v. Brown.

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is not before the court. The defendants did right in refusing to sign the bill and the

WRIT IS DENIED.

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GEORGE Z. WORK ET AL., APPELLANTS, v. HARVEY E.  
BROWN ET AL., APPELLEES.

FILED NOVEMBER 28, 1893. No. 4967.

1. **Garnishment: SUFFICIENCY OF ANSWER OF GARNISHEE: FAILURE TO OBEY ORDERS OF COURT.** A garnishee who answers fully and in good faith as to the matters in garnishment proceedings and obeys the orders of the court will be fully protected; but if his answer is evasive, equivocal, and in the interests of one or more creditors, and he fails to obey the orders of the court in relation to the property or money in his hands, he acts at his peril.
2. **Liability of Garnishee for Interest on Funds in His Hands.** *Held*, That the plaintiffs were entitled to interest on \$223.57, and the judgment so modified.
3. **The lien of transcripts of judgments rendered in the county court is governed by section 18, chapter 20, Compiled Statutes.**

APPEAL from the district court of Johnson county.  
Heard below before APPELGET, J.

*S. P. Davidson*, for appellants, cited: *Russell v. Lau*, 30 Neb., 812.

*Clarence K. Chamberlain*, contra:

Transcripts of judgments rendered in the county court become liens when filed in the office of the clerk of the district court. (Sec. 18, ch. 20, Comp. Stats.; *Eaton v. Ryan*, 5 Neb., 47; *Lamb v. Sherman*, 19 Neb., 681.)

*Daniel F. Osgood*, also for appellees.

MAXWELL, C. J.

This is an action in the nature of a creditor's bill to set aside a mortgage alleged to be fraudulent, and to have the priority of the liens claimed by the respective parties determined, and to have the real estate covered by such liens sold, and the proceeds applied in satisfaction of said liens, according to their priority. Plaintiffs allege in their petition that on the 18th day of August, 1888, they commenced an action in the district court of Johnson county, Nebraska, against said Harvey E. Brown, to recover the sum of \$420.63 and interest and costs, and caused an order of attachment to issue therein, which was on same day, at 4 o'clock P. M., levied upon the undivided one-half of lot 6, in block 2, in the village of Elk Creek, Johnson county, Nebraska, as the property of said Brown, and the same then became and still is a subsisting lien upon said property; that on the 23d day of May, 1889, said cause came on for hearing in said court, and judgment was entered in favor of said plaintiffs for \$434.63 and costs, taxed at \$44.48, and that the property attached be sold and the proceeds of sale be applied in satisfaction of said judgment remaining unpaid by the proceeds of the garnishment process; that at the commencement of said action plaintiffs caused garnishment process to issue, which was served upon James D. Russell as garnishee, and in compliance with the command thereof said Russell answered that under a chattel mortgage executed by Brown to him he had taken possession of the property of Brown covered by the mortgage, and in accordance with its terms had sold enough thereof to satisfy his claim secured by said mortgage, and \$237 more, which sum of \$237 he still held in his hands, and the court thereupon ordered said Russell to pay said surplus so remaining in his hands into court, to be applied upon said judgment and costs, which sum the court erroneously found amounting to \$260 with interest; that afterwards one H.

P. Lau, claiming a lien upon said surplus in the hands of Russell, prior to the garnishment lien of these plaintiffs, brought suit therefor against Russell in said district court, and on the 19th day of November, 1889, after a full hearing of all the facts in said last mentioned case, it was adjudged by the court that the lien of Lau upon the surplus in Russell's hands was prior and superior to the garnishment lien of these plaintiffs, and Russell had been compelled by said judgment to pay said surplus to said Lau; by reason whereof these plaintiffs have been compelled to surrender all claim upon the surplus by reason of said garnishment order, and rely exclusively upon their attachment lien upon said real estate to satisfy their said judgment, which remains wholly unpaid, and there is due thereon \$513.53, and interest from February 14, 1891. The petition sets out a mortgage executed by said Harvey E. Brown to his wife Ellen Brown, and alleges that the same was given without consideration, fraudulently, for the purpose of hindering and delaying his creditors, and that Harvey E. Brown is insolvent, and that execution was issued upon said judgment in favor of these plaintiffs and returned unsatisfied for want of property whereon to levy; that W. V. Morse & Co., R. L. McDonald & Co., and the other defendants, naming them, claim some interest in or lien upon said real estate, as judgment creditors of said Harvey E. Brown, the true nature of which is unknown to plaintiffs, but the same is second, subordinate, and inferior to said attachment lien of these plaintiffs. The prayer is that said mortgage may be canceled, annulled, and set aside; that said order in garnishment be vacated and set aside; that plaintiffs' said attachment lien be declared the first and best lien upon said real estate for the full amount alleged to be due thereon as above mentioned; that said attached real estate be sold and the proceeds applied in satisfaction of said plaintiffs' attachment lien and costs, and the balance, if any, be applied as this court may direct; and that plaintiffs may have general relief.

Neither Brown nor his wife answered. W. V. Morse & Co., and the other defendants, who are judgment creditors of said Brown, each filed an answer setting up their respective judgments against said Brown and claiming the priority of lien by reason thereof, and allege that by reason of the garnishment proceedings set out in plaintiffs' petition, plaintiffs' attachment lien has been satisfied to the amount of \$237, the surplus in the hands of the garnishee. To each of these answers plaintiffs file general denials.

At the April term, 1891, of the district court this cause was tried. Mr. Russell made an equivocal answer in the garnishment case and did not pay the money into court as ordered, and it does not clearly appear that he acted in good faith with other creditors of Brown. A garnishee, so far as different creditors are concerned, is a mere stakeholder. He should have no interest in the disposition of the funds to one creditor more than another. If he acts in good faith and answers fully and unequivocally in regard to the matters on which the garnishment is based, he will be protected. If he fails to do this, he does so at his peril. If he is garnished in more than one case, he must bring that fact to the knowledge of the court by answer or supplemental answer and invoke its protection. (Drake, Attachment, sec. 630a.) The court did not err, therefore, in refusing to credit him with the \$237.50, which he claims to have paid as garnishee. Plaintiffs were entitled to interest, however, on the residue at the legal rate, and the clerk is directed to compute interest on \$223.57 to the date of the judgment in the district court, and to that extent the judgment of the court below is modified.

The lien of a judgment rendered in the county court and a transcript filed in the district court is created by section 18, chapter, 20, Compiled Statutes, as follows: "Any person having a judgment rendered by a probate court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this

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In re Scott.

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state, and when said transcript is so filed, and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed, and when the same is so filed and entered upon such judgment book, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court." The section above quoted makes a transcript of a judgment of the county court a lien from the date of filing in the district court. The lien of a judgment is created by statute and depends for its validity thereon. The statute in question is a special provision applicable to judgments in county courts and applies in this case. The court did not err, therefore, in establishing the priority of liens. The judgment as modified is affirmed.

JUDGMENT ACCORDINGLY.

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IN RE BARRETT SCOTT.

FILED NOVEMBER 28, 1893. No. 6562.

1. Upon an application for reduction of bail by a prisoner, after indictment and before trial, the guilt of the accused will be presumed, but evidence may be received to repel that presumption.
2. Review by Habeas Corpus. An order of the district court fixing the amount of bail a prisoner shall give will not be disturbed by the supreme court in a proceeding by *habeas corpus* for reduction of bail, unless it clearly appears *per se* that the amount is unreasonably great and disproportionate to the offense charged.
3. In fixing the amount of bail the court or judge may take into consideration the nature of the offense; the penalty which the law authorized to be inflicted should there be a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pecuniary condition, and the circumstances surrounding the case.

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In re Scott.

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4. **Amount of Bail Required Under Indictment for Embezzlement.** *Held*, That the bail fixed by the district court for the appearance of the petitioner is not excessive.

ORIGINAL application for writ of *habeas corpus*.

The facts are stated in the opinion.

*E. W. Adams* and *J. H. Broady*, for petitioner:

The purpose of holding a person in custody to answer at a trial according to the law of the land, is not to punish him, but to secure his attendance at the trial. The constitution provides for release on bail, and that excessive bail shall not be required. (Constitution of Nebraska, sec. 9, art. 1.)

It is substantially a denial of bail and a violation of the constitutional guaranty against excessive bail to require a larger sum than from his circumstances the prisoner can be reasonably expected to give. (*United States v. Brawner*, 7 Fed. Rep., 86.)

Whether the bail is excessive, in effect, depends largely upon the pecuniary condition of the accused. Bail, to be reasonable in amount, should correspond to the financial condition of the country where the prisoner lives, and of himself and his friends. (*Ex parte Hutchings*, 11 Tex., App., 28; *McConnell v. State*, 13 Tex. App., 390; 2 Am. & Eng. Ency. Law, 12, 13, and cases cited.)

In considering the question of the amount of bail required, the presumption of guilt does not attach. (2 Bishop, Criminal Procedure, sec. 708.)

*H. M. Uttley*, *R. R. Dickson*, and *J. B. Barnes*, also for petitioner.

*H. E. Murphy* and *M. B. Reese*, contra:

The constitutional question sought to be presented is not to be applied to this case. It belonged to the district court alone. (Cooley, Const. Lim., p. 377.)

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In re Scott.

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The presumption of innocence does not obtain, and the accused must be presumed to be guilty. The presumption changes after the indictment from that of innocence to that of guilt. Had the district court refused to admit the accused to bail, or to exercise any discretion, a different question would have been presented from what we have before us. The court did act, and decided. It acted judicially. This was final. (*Ex parte Duncan*, 53 Cal., 410, 54 Cal., 75; *In re Williams*, 23 Pac. Rep. [Cal.], 118; *Ex parte Ryan*, 44 Cal., 555; *People v. Dixon*, 4 Parker's Crim. Rep. [N. Y.], 651; *Ex parte Bryant*, 34 Ala., 270.)

NORVAL, J.

This was an application by Barrett Scott for a writ of *habeas corpus* to procure a reduction of the amount of his bail bond, alleging his inability to give a bond in the sum of \$70,000, the amount fixed by the district court of Holt county, and that said sum is excessive. At the September, 1893, term of the district court of the county of Holt the grand jury returned an indictment charging the petitioner on the 4th day of August, 1893, as county treasurer of said county, with embezzling the sum of \$70,000 of the public moneys belonging to said county. On the 7th day of October, 1893, on application of the prisoner to be admitted to bail, the district court fixed the amount of his recognizance at \$24,000. Subsequently, on the 16th day of the same month, on motion of the county attorney, the district court, Judge Kinkaid presiding, increased the amount of recognizance to the sum of \$70,000; and Scott refusing to give a bond in such sum, it was ordered by the court that he be remanded to the county jail until such recognizance be given.

There is no room for doubt that the district court has the power to increase or diminish the amount of bond a prisoner shall give for his appearance before said court and to answer to a criminal charge preferred

against him, at least during the term at which the original order fixing the amount of bail was made, and before any recognizance has been given. It is too well settled to require the citations of authorities, that courts of general jurisdiction, like district courts, have the authority to change, vacate, and set aside their own orders and judgments during the term at which they are entered, unless rights have become vested thereunder; and this power is a discretionary one, and cannot be controlled, unless there has been an abuse of discretion. In case a prisoner has been released on his giving a recognizance, the power of the court afterwards to raise the amount of the bond and require the accused to enter into a new recognizance, perhaps does not exist. In the case we are considering, however, the record conclusively shows that after the amount of the bond was first fixed at \$24,000, and during the same term of court, but before the accused had succeeded in procuring a sufficient number of persons to sign his bond as security, the court increased the penalty of the bond to \$70,000. The order in that behalf was not void.

It is insisted by counsel for the petitioner that the amount at which his bail was finally fixed is unreasonable and excessive, and a violation of the constitutional guaranty which declares that "all persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption is great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Constitution, art. 1, sec. 9.)

Before entering upon a discussion of the question whether excessive bail has been required in this case, there are two other questions which we will first briefly consider, namely: Is the order of the district court fixing the amount of the recognizance final and conclusive? On an application to bail, after indictment, what presumption, if any, does the law raise as to the guilt or innocence of the accused?

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In re Scott.

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Section 346 of the Criminal Code provides that "when any person charged with the commission of any bailable offense shall be confined in jail, whether committed by warrant under the hand and seal of any judge or magistrate, or by the sheriff or coroner, under any warrant upon indictment found, it shall be lawful for any judge of the supreme court, judge of the district court within his district, \* \* \* to admit such person to bail by recognizing such person in such sum and with such securities as to such judge shall seem proper, conditioned for his appearance before the proper court to answer the offense wherewith he may be charged."

Section 358 of chapter 34 of the Criminal Code, entitled "Habeas Corpus," declares that "when the said judge shall have examined into the cause of the caption and detention of the person so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such prisoner from said confinement; and in case the person or persons applying for such writ shall be confined or detained in a legal manner, on a charge of having committed any crime or offense, the said judge shall, at his discretion, commit, discharge, or let to bail such person or persons; and if the said judge shall deem the offense bailable on the principles of law, he shall cause the person charged as aforesaid to enter into recognizance with one or more sufficient securities, in such sum as the judge shall think reasonable, the circumstances of the prisoner and the nature of the offense charged considered, conditioned for his appearance at the next court where the offense is cognizable," etc.

The section first above quoted confers authority upon a judge of the district court to let a prisoner to bail, when the offense charged is a bailable one, and to determine in what sum the bond shall be given. Of course, a discretion rests with the judge in fixing the amount of the recognizance; but this discretion is a judicial one. The decision

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In re Scott.

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of the judge, however, is not necessarily final and conclusive. Suppose in violation of the constitutional provisions excessive bail be demanded and the prisoner required to give a recognizance in a sum greatly in excess of that which the nature of the offense and the circumstances of the case demand. Would it for a moment be contended that the prisoner is without a remedy? Certainly not. He may in such a case in a proceeding by *habeas corpus* have the amount of bail reduced or fixed anew under the section last above quoted. (*Jones v. Kelly*, 17 Mass., 116; *State v. Best*, 7 Blackf. [Ind.], 611; Church, *Habeas Corpus*, 398; *Miller v. State*, 43 Tex., 579.)

Counsel for the respondent insist that, on the determination of an application to admit to bail after indictment, the presumption of innocence does not obtain, but that the accused is presumed to be guilty of the offense laid in the indictment. The authorities upon the subject are conflicting. The following sustain the contention of counsel: *People v. Dixon*, 4 Park. Crim. Rep. [N. Y.], 651; *Ex parte Ryan*, 44 Cal., 555; *Ex parte Duncan*, 53 Cal., 410, 54 Cal., 75. Other cases uphold the doctrine that even after indictment found, in an application for reduction of bail, the court or judge will receive evidence as to the probable guilt of the prisoner. (*Yarbrough v. State*, 2 Tex., 519; *Drury v. State*, 25 Tex., 45; *Ex parte Bryant*, 34 Ala., 270; *Ex parte Hammock*, 78 Ala., 414; *Ex parte Vaughn*, 44 Ala., 417; *Commonwealth v. Rutherford*, 5 Randolph [Va.], 646; *Lynch v. People*, 38 Ill., 494; *Lumm v. State*, 3 Ind., 293; *Ex parte Kramer*, 19 Tex. App., 123; *Wray's Case*, 30 Miss., 681; *Street v. State*, 43 Miss., 1; *State v. Summons*, 19 O., 141; *Ex parte Kittrel*, 20 Ark., 499; Church, *Habeas Corpus*, sec. 403a.) The rule which occurs to us as being the most reasonable and most likely to aid in the administration of justice is this: That on application for bail by a person held in custody under an indictment found by a grand jury, the presentment of an indictment makes out

a *prima facie* case of guilt; but this presumption may be overcome by proof. In other words, the court, on *habeas corpus*, is not concluded by the finding of the grand jury, but may go behind the indictment and take evidence as to the truthfulness of the charge. This rule is fully supported by the cases last cited, and by the weight of the decisions in this country. In the case at bar the legal presumption of guilt is not overthrown by the evidence.

We will next consider whether excessive bail was required of the petitioner by the district court within the meaning of that term as used in our bill of rights. The question is not whether the amount of bail required is high, or whether we would have fixed so large a sum had the application been made to us in the first instance, but rather, was the bail demanded, *per se*, unreasonable, and disproportionate to the crime charged in the indictment. This, in substance, is the rule governing applications like the one before us as laid down in the decisions already cited.

From the evidence in the record it is not improbable that the petitioner will be unable to procure bail in the sum of \$70,000; but that alone is not sufficient to establish that the amount is excessive or should be reduced. We do not question that the pecuniary circumstances of a prisoner should be considered in determining the amount of bail, yet that should not in itself control. If it did, a prisoner who is without means or friends would be entitled to be discharged on his own recognizance. (*People v. Town*, 3 Scam. [Ill.], 19; *Ex parte Duncan*, *supra*.) The object of requiring bail is to secure the attendance of the prisoner to answer to the offense charged, and abide the judgment and sentence of the court, should he be found guilty. Many things should be taken into consideration in fixing the amount of bail, such as the atrocity of the offense; the penalty which the law authorizes to be inflicted in case of a conviction; the probability of the accused appearing to answer the charge against him, if released on bail; his pe-

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In re Scott.

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cuniary condition and the nature of the circumstances surrounding the case. This petitioner is charged with embezzling \$70,000 of the public funds of Holt county,—a grave and heinous offense. Under the statute, in case a conviction is had, there may be imposed as a punishment an imprisonment in the penitentiary for twenty-one years, besides a fine of double the amount of money embezzled. Bail was not required in this case for a larger amount than the sum alleged to have been obtained by the commission of the offense. In *Ex parte Duncan, supra*, the petitioner had been held to bail by the municipal court of San Francisco in the sum of \$112,000 on several indictments for forgery, grand larceny, and embezzlement, the sums alleged to have been received by him by reason of the commission of such felonies aggregating that sum. In a proceeding on *habeas corpus*, for reduction of bail, the supreme court of California held that the amount of bail demanded was not excessive.

Something was said on the argument of the case under consideration about the petitioner having once forfeited his recognizance. If this were true, that would be a proper matter for consideration in fixing the amount of his bond. The evidence shows a complaint was filed by one W. F. Hays before the county court of Holt county, charging Scott with embezzling county funds. The accused waived a preliminary examination and gave a bond in the sum of \$15,000 for his appearance at the March, 1893, term of the district court of the county. At said term the county attorney filed an information charging Scott with the crime of embezzlement. The accused attended the March term of the district court and demanded trial, but the case was not reached. At the following term of said court, Scott having failed to appear, his bail was declared forfeited. It is probable, and for the purpose of this case we shall assume, without deciding the question, that, under the recognizance, the petitioner was only legally bound to personally

appear during the March term. The testimony, however, discloses that the petitioner, while the said charge of embezzlement was pending against him in the district court of Holt county, absconded from the county and state and fled to the republic of Mexico. Subsequently, after the expenditure of a large sum of money, the state procured his return to the county. The fact that he absconded is an important circumstance which should be considered, and it doubtless had great weight with the district court in determining the amount of the petitioner's bond. Upon the whole case we are constrained to hold that the amount of the recognizance required of the petitioner, although high, is not excessive. The writ, therefore, is denied.

WRIT DENIED.

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STATE OF NEBRASKA, EX REL. ALBERT E. WYCKOFF,  
V. MARION G. MERRELL ET AL.

FILED NOVEMBER 28, 1893. No. 4666.

**Mandamus:** FORUM OF ORIGINAL JURISDICTION. The supreme court will not entertain an original application for *mandamus* brought by a private individual for the enforcement of private rights, unless some good reason is shown why the application was not made to the district court.

ORIGINAL application for *mandamus*.

*Chas. T. Dickinson*, for relator.

*N. J. Sheckell*, contra.

NORVAL, J.

This is an original action in the name of the state, on the relation of Albert E. Wyckoff, for a *mandamus* to

Marion G. Merrell, as county clerk of Burt county, to compel him to execute and deliver to relator a warrant upon the county treasurer for the sum of \$893.55 for excavating a public ditch, and to E. F. Sisson and others, as the board of county commissioners of said county, to require them to levy a special assessment upon the lands benefited by said improvement to pay the expenses thereof.

This court will not entertain an original application for a *mandamus* brought by a private citizen for the enforcement of a private right merely, unless some good reason is shown for not making the application to the district court. (*State v. Lincoln Gas Co.*, 38 Neb., 33; *State v. School District No. 24, Chase County*, 38 Neb., 237.) The several district courts of the state have concurrent jurisdiction with this court in *mandamus* cases, and applications like the one before us ordinarily should be made in the first instance to the district court. There may be cases where the application shows that it would be unavailing if made to the proper district court, and that it is necessary that the writ should issue here. When this is made to appear, this court will entertain jurisdiction. This case, however, does not fall within the rule. It is manifest that the ends of justice would be equally as well promoted, and the convenience of the parties would be as well subserved, if the application were made to the district court of Burt county. The proceeding dismissed without prejudice.

DISMISSED.

FOWLER ELEVATOR COMPANY v. L. R. COTTRELL  
ET AL.

FILED NOVEMBER 28, 1893. No. 5447.

1. **Statute of Frauds: SUFFICIENCY OF MEMORANDUM.** The written memorandum required by section 9 of our statute of frauds (ch. 32, Comp. Stats.) may be made out by connecting two or more separate papers, such as the written correspondence between the parties.
2. ———: ———. It is not essential in such case that each paper be signed by the party sought to be charged, provided those not thus signed are referred to with reasonable certainty in those which are signed.
3. ———: ———: **PAROL EVIDENCE.** But the relation to each other of the documents relied upon to satisfy the requirement of the statute must appear on their face and cannot be established by parol evidence.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*Wharton & Baird*, for plaintiff in error.

*Ed. P. Smith*, contra.

POST, J.

This is a petition in error from the district court of Douglas county. A demurrer was sustained to the petition in that court, and the plaintiff refusing to plead further the action was dismissed with costs. The controversy in this court, therefore involves but one inquiry, viz., does the petition state a cause of action? The material allegations thereof are as follows: On the 4th day of March, 1891, the plaintiff, a corporation doing business in the city of Omaha, entered into an agreement by telephone with the defendants, then residing and doing business in the city of

Seward, by which the latter sold and agreed to deliver to plaintiff, or its representative, in the city of St. Louis, Mo., within thirty days thereafter, 10,000 bushels of No. 3 corn at 54½ cents per bushel. On the same day plaintiff addressed the defendants the following communication, which was in due course of mail received by the latter at Seward:

“OMAHA, Neb., March 4, 1891.

“*Mess. Cottrell, Alden & Co., Seward, Neb.*—DEAR SIRS: This confirms purchase of you by telephone to-day of 10,000 bu. No. 3 corn or better, at 54½c per bu., delivered at St. Louis, Mo., Pac. Ry., 30 days shipment, St. Louis terms. Please ship as follows:

{	Order Fowler Elevator Co.
	Notify John A. Warren & Co.
	St. Louis, Mo.
	Care Mo. Pac. Ry., Lincoln, Neb.

“Make drafts, B. of L. attached, on Fowler El. Co., Omaha, Neb. Order and use Mo. Pac. cars to avoid transferring the grain.

“Yours truly, FOWLER ELEVATOR CO.,  
“E.”

To which, on the 30th day of March, the defendants replied as follows:

“SEWARD, NEB., March 30, 1891.

“*Fowler Elevator Co., Omaha, Neb.*—GENTS: It will be impossible for us to ship you, or your St. Louis firm, Jno. A. Warren & Co., any corn. We hope this will not seriously inconvenience you.

“Yours, etc., COTTRELL, ALDEN & CO.”

On the following day plaintiff wrote defendants as follows:

OMAHA, NEB., March 31, 1891.

“*Cottrell, Alden & Co., Seward, Neb.*—DEAR SIRS: Your favor of the 30th at hand stating that it will be im-

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Fowler Elevator Co. v. Cottrell.

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possible to ship us any corn and hoping that it will not seriously inconvenience us.

"We do not understand just what you mean, as your Mr. Cottrell was here a few days ago and asked for an extension of time of shipment, and we agreed to allow him ten days extension. Mr. Cottrell at the time said that you had the corn, and twenty-five to thirty cars besides, as yet unsold. We are willing to grant you an extension until April 14, but can see no reason why you should not be able to get the corn out by that time; and considering the present condition of the cash corn market we think we are treating you very liberally. It most certainly would inconvenience us not to have you ship this corn, as you must know that to protect ourselves we must sell each day against all purchases, and of course our St. Louis firm look to us for this corn. Please let us hear from you more fully on the subject.

"Yours truly,

FOWLER EL. CO.,  
"E."

And on the 2d day of April, the defendants replied as follows:

"SEWARD, NEB., April 2, 1891.

"*Fowler Elevator Co., Omaha, Neb.*—GENTS: Replying to your letter of March 31, at the time corn sale in question was made, we supposed we had control of the corn and could handle it and sell it. Since then obstacles have presented themselves, and circumstances over which we have no control will prevent us from filling the sale. We cannot, therefore, fill the sale, much to our chagrin, and you will have to look elsewhere for the corn.

"Yours, etc.,

COTTRELL, ALDEN & CO."

The other allegations relate to the subject of damage and do not call for notice in this opinion, since it is conceded that the only question presented by the record is the sufficiency of the correspondence set out above to satisfy

the requirements of section 9 of our statute of frauds (ch. 32, Comp. Stats.). The provisions of the section referred to are as follows: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless: First—A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or, Second—Unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or, Third—Unless the buyer shall, at the time, pay some part of the purchase money." It is not essential that a contract be evidenced by a single document in order to bring it within the first exception contained in the foregoing section. All writers agree that it is a sufficient compliance with the statute if the terms of the agreement can be determined with reasonable certainty from two or more separate papers. Nor are they all required to be signed by the party sought to be charged, provided those not thus signed are referred to in those which are signed. But the connection between such documents must appear from the signed memoranda, and cannot be established by parol evidence. (See *Boydell v. Drummond*, 11 East [Eng.], 142; *Coles v. Trecothick*, 9 Ves. [Eng.], 250; *Ridgeway v. Wharton*, 6 H. L. Cases, [Eng.], 237; *Blair v. Snodgrass*, 1 Sneed [Tenn.], 1; *Thayer v. Luce*, 22 O. St., 62; *Johnson v. Buck*, 35 N. J. Law, 338; *Tice v. Freeman*, 30 Minn., 389; *Ridgway v. Ingram*, 50 Ind., 145; *North v. Mendel*, 73 Ga., 400; *Brown v. Whipple*, 58 N. H., 229; *Carter v. Shorter*, 57 Ala., 256; *Boardman v. Spooner*, 13 Allen [Mass.], 353; Benjamin, Sales, 222; Reed, Statute of Frauds, 341; Wood, Statute of Frauds, 364.) Assuming the written correspondence in this case to be otherwise a sufficient compliance with the demand of the statute, it is entirely insufficient, as a memorandum, to charge the defendants, for the reason that no reference is therein made by the latter to the first and only communication in which mention is made of

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Nebraska Loan & Trust Co. v. Smassall.

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the terms or conditions of the alleged agreement. True, it is charged in the petition that the letter of defendants, under date of April 2, refers to the contract mentioned in plaintiff's first communication, but it is apparent from the other allegations thereof that the foregoing correspondence is the only written evidence of the agreement sued on. It is evident, too, when tested by the authorities cited, that such correspondence does not amount to a memorandum in writing within the meaning of the statute. It may be observed further that had the letters of the defendants referred in the most unequivocal terms to the plaintiff's communication of March 4, the statute is still applicable, since we find therein no acknowledgment of the alleged parol agreement, but on the other hand an express repudiation thereof. It follows that the petition does not state a cause of action, that the order sustaining the demurrer is right, and that the judgment of the district court should be

**AFFIRMED.**

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**NEBRASKA LOAN & TRUST COMPANY V. CHRISTINA  
SMASSALL ET AL., APPELLANTS, IMPLEADED WITH  
CHARLES W. MOSHER, APPELLEE.**

**FILED DECEMBER 22, 1893. No. 6212.**

**Validity of Mortgage Upon Life Estate.** Under the provisions of section 17, chapter 36, Compiled Statutes, if the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, etc. This life estate the survivor may mortgage, and the purchaser under the decree of foreclosure will acquire the life estate.

**APPEAL** from the district court of York county. Heard below before BATES, J.

*George B. France*, for appellants, cited: *Butterfield v. Wicks*, 44 Ia., 310; *Smith v. Eaton*, 50 Ia., 488.

*Sedgwick & Power*, contra, cited: *Schuyler v. Hanna*, 31 Neb., 307; *Dorsey v. Hall*, 7 Neb., 465; *Holbrook v. Wightman*, 31 Minn., 172; 6 Am. & Eng. Ency. Law, 881.

MAXWELL, C. J.

In May, 1892, the Nebraska Loan & Trust Company brought this action in the district court of York county, Nebraska, against Christina Smassall and the heirs of Joseph Smassall, deceased, and also Charles W. Mosher, who held a second mortgage upon the premises hereafter described in the decree. There is no dispute in regard to the plaintiff's claim, but the controversy in this case arises upon that of Charles W. Mosher, who claims a second mortgage upon the premises, signed by defendant John Faul, and one of the appellants, Christina Faul, formerly the wife of Joseph Smassall, deceased, and who had intermarried with John Faul. The note, which was secured by this mortgage, was signed by John Faul. At the time of the death of Joseph Smassall, and for some time prior thereto, he and his family, consisting of his wife and five children, were, and had been, residing upon this land, and the same was their homestead. The appellant Christina Smassall afterwards intermarried with John Faul, and she with her family have resided on said land ever since the death of Joseph Smassall, and are now residing thereon. The appellants claim that the appellee Charles W. Mosher obtained no lien upon the land by virtue of the mortgage given by Christina Faul and her husband to the appellee Charles W. Mosher. The court entered the following decree upon the mortgage of Mosher:

"Now on this 14th day of January, 1893, this cause came on for hearing on the answer and cross-petition of

Charles W. Mosher and the answer thereto of Christina Faul and Christina Faul, guardian of the minor heirs of Joseph Smassall, deceased, and the answer of George B. France, guardian *ad litem* of the said minor heirs, and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendants Christina Faul and John Faul are husband and wife, and that they, on the 6th day of October, 1891, executed and delivered to Stark & Mosher the mortgage deed described in the answer and cross-petition of Charles W. Mosher, on the west half of the northeast quarter of section 25, in township 10 north, of range 4 west, in York county, Nebraska. Said mortgage was duly recorded in the office of the clerk of said county on the 21st day of March, 1892, in book 55 of mortgages, at page 487. The court finds that afterwards the payees, Stark & Mosher, sold, indorsed, and delivered the said mortgage and the note secured thereby to said Charles W. Mosher, who then became, and now is, the owner and holder thereof. The court finds that there is due the said Charles W. Mosher from the said John Faul and Christina Faul the sum of \$316, with ten per cent interest from the date of this decree. The court finds that John Faul, who signed said mortgage, had no title to, and did not own, the land described therein at the time of the execution of said mortgage; that the defendant Christina Faul, as the widow of Joseph Smassall, had at the time of executing said mortgage a life estate in said premises and was possessed of a dower interest therein; and said mortgage executed by said John Faul and Christina Faul to said Stark & Mosher became, and is still, a lien on the life estate interest of the said Christina Faul and John Faul in said premises.

“It is hereby ordered that unless the said Christina Faul and John Faul, within twenty days from the entry of this decree, pay, or cause to be paid, to the said Charles W. Mosher the sum of \$316, with interest, that an order

of sale issue to the sheriff of said York county, directing him to appraise, advertise, and sell the interest of the said Christina Faul and John Faul in the said premises, and of his doings in the premises he make due return to this court; to which the defendants Christina Faul and George B. France, guardian *ad litem* for the minor heirs, duly excepts."

Section 17, chapter 36, of the Compiled Statutes of 1887, provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." The homestead thus becomes a life estate in the survivor. This estate the survivor may mortgage where there is no restriction in the statute, and as there is no such restriction in the laws of this state the mortgage is valid. (*Schuyler v. Hanna*, 31 Neb., 307; *Durland v. Seiler*, 27 Neb., 33; *Holbrook v. Wightman*, 31 Minn., 168.) There is no error in the record and the judgment is

**AFFIRMED.**

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Moline, Milburn & Stoddard Co. v. Curtis.

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**MOLINE, MILBURN & STODDARD COMPANY V. H. J.  
CURTIS ET AL.**

FILED DECEMBER 22, 1893. No. 4909.

1. **A motion to dissolve an attachment, to be available, must be made before final judgment in the action. Where such a motion has been made and heard before the trial of the cause, and taken under advisement, the court may, after judgment for the plaintiff, rule upon the motion.**
2. **An affidavit for attachment is not void, although purporting in its opening clause to be that of a corporation plaintiff, where it sufficiently appears from the whole affidavit that it is that of the agent of the corporation, and that such agent in fact made oath thereto and signed it.**
3. **An affidavit for an attachment may be amended by leave of court, even after a motion to quash the writ is filed, because of that particular defect. (*Struthers v. McDowell*, 5 Neb., 491.)\***
4. **Bill of Exceptions. A COUNTY JUDGE has no power or authority to sign a bill of exceptions preserving the evidence used in the hearing of a motion to discharge an attachment. (*Baer v. Otto*, 34 O. St., 11.) MAXWELL, C. J., dissenting.**

ERROR from the district court of Johnson county. Tried below before BROADY, J.

*Switzler & McIntosh* and *L. C. Chapman*, for plaintiff in error.

*S. P. Davidson* and *Corydon Rood*, contra.

NORVAL, J.

This was an action brought in the county court by plaintiff in error, aided by attachment, against the defendants in error. Prior to the trial a motion was made and

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\* If the plaintiff, at the date of issuing an attachment, does not own the claim for which he seized the defendant's property, he cannot afterwards, by purchasing such claim, assert it by amendment against the property seized. (*Fairwell v. Wright*, 38 Neb., 445.)

38	520
38	666
39	520
38	520
43	262
143	309
143	333
38	520
144	11
38	520
45	87
38	520
149	23
49	436
49	855
51	103
51	612
52	553
52	825
38	520
57	229
38	520
158	55

submitted to the county court to vacate the attachment, which was taken under advisement. Some time after judgment was rendered in favor of plaintiff in the main case, the defendants' motion to discharge the attachment was denied by the county court; and to reverse said order defendants prosecuted a petition in error to the district court, where the decision of the county court sustaining the attachment was reversed, and the attachment dissolved. Plaintiff thereupon prosecuted a petition in error to this court.

Three questions are presented for our determination, namely:

1. Where a motion to dissolve an attachment has been submitted to the court and taken under advisement before trial and judgment in the action, can the court, after judgment has been rendered for the plaintiff, pass upon such motion?

2. Did the county court err in permitting plaintiff to amend the original affidavit for attachment?

3. Has a county judge authority to sign and allow a bill of exceptions embodying affidavits used on the hearing of a motion to discharge an attachment?

Plaintiff insists that the order of the county court sustaining the attachment was without authority of law and void, for the reason the same was not made until after final judgment in the action. The statute bearing upon the question, section 235 of the Code, declares that "the defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or a part of the property attached." The most that can be claimed for this provision is that a motion to dissolve an attachment, to be available, must be made before final judgment has been rendered for the plaintiff in the action. Of course, a final judgment in favor of a defendant on the merits terminates the attachment proceedings, and vacates the attachment; but a final judgment in

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Moline, Milburn & Stoddard Co. v. Curtis.

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favor of the plaintiff does not have the effect to sustain the attachment in all cases. The only reasonable construction of the section quoted is that the authority of the court to dissolve an attachment is limited to cases where a motion to discharge is filed before judgment. In other words, where such a motion is seasonably made and submitted to the court for its decision thereon, but through inadvertence or otherwise no ruling has been made before final judgment on the merits, the court has jurisdiction to rule upon the motion after such judgment. The question now before us was not raised or decided in *Rudolf v. McDonald*, 6 Neb., 163. In that case the motion to dissolve the attachment was not made until after final judgment, and it was held to be too late to be of any avail to the party making it. In the case before us, not only was the motion made before judgment, but a hearing thereon was had, and the same taken under advisement. The failure of the court to rule thereon sooner is not chargeable to the defendants, but was the fault of the court alone. Under the circumstances it was the duty of the county judge to pass upon the motion after judgment had been entered for plaintiff in the action.

Was the original affidavit on which the attachment was issued defective, and did the county judge err in permitting plaintiff to amend the same? We answer in the negative. The original affidavit for attachment is as follows:

"STATE OF NEBRASKA, }  
JOHNSON COUNTY. } ss.

"The said plaintiff, the Moline, Milburn & Stoddard Company, makes oath that the claim in this action is for a recovery of a judgment for money in the sum of nine hundred and seventy-five dollars and  $\frac{36}{100}$ , and the said S. W. Croy, agent of the Milburn, Moline & Stoddard Company, also makes oath that said claim is just, and that the Moline, Milburn & Stoddard Company ought, as affiant believes, to recover thereon nine hundred and seventy-five dollars and  $\frac{36}{100}$ . He also makes oath that the said Har-

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Moline, Milburn & Stoddard Co. v. Curtis.

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rison J. Curtis, Henry B. Curtis, and Mary E. Curtis, parties composing the firm of H. J. Curtis & Co., defendants, are about to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors; that said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis has property and rights in action which they conceal; that the said Harrison J. Curtis, Henry B. Curtis, and Mary E. Curtis have assigned, removed, and disposed of, and they are about to dispose of, their property, or a part thereof, with intent to defraud their creditors.

S. W. CROY,

*"Agent for Moline, Milburn & Stoddard Company."*

"Subscribed in my presence and sworn to before me this 30th day of October, A. D. 1889.

"JOHN WILSON,  
"County Judge."

Although the affidavit in the opening clause, relating to the nature of plaintiff's claim, standing alone, purports to be that of the corporation, but when read in connection with what follows, and construing the paper as a whole, as we must, it sufficiently appears that S. W. Croy makes oath to each averment contained in the affidavit, and that he is plaintiff's agent. A similar affidavit was sustained by this court in *Whipple v. Hill*, 36 Neb., 720. (See also *Rudolf v. McDonald*, 6 Neb., 163; *Tessier v. Englehart*, 18 Neb., 167, and *Jansen v. Mundt*, 20 Neb., 320.)

The county court permitted plaintiff to amend the affidavit by inserting "S. W. Croy, Secretary and Treasurer of" after the word "plaintiff" in the first line. The alleged defect was thereby cured. It is not error to permit an affidavit for attachment to be amended, even after a motion to dissolve has been filed. (*Struthers v. McDowell*, 5 Neb., 491; *Rudolf v. McDonald*, *supra*.)

It appears that the motion to vacate the attachment was heard upon affidavits filed by the plaintiff, and on counter-affidavits submitted by the defendants. The county judge

signed a bill of exceptions embodying all these affidavits, and in the district court plaintiff moved to quash the bill, on the ground that there is no authority of law for signing a bill of exceptions in such cases. The motion was overruled, and this ruling is assigned as error.

Before entering upon the consideration of this branch of the case, it should be stated that the cause was originally submitted to the supreme court commissioners for examination and report. Subsequently, an opinion prepared by Commissioner IRVINE, covering every proposition presented by the record, which was concurred in by both the other commissioners, was submitted to the court, and the members thereof being divided in opinion upon one proposition, viz., the jurisdiction of the county judge to sign the bill of exceptions, I will give my views upon the subject.

Commissioner IRVINE, in discussing the question, says: "It is not doubted that an order sustaining an attachment is, at least after judgment in the action, a final order, which the defeated party may have reviewed on error. (*Walker v. Morse*, 33 Neb., 650.) The question is not whether such an order may be reviewed, but whether the evidence used on the hearing of the motion in the county court may be preserved by a bill of exceptions for use in the error proceedings.

"By chapter 20, Compiled Statutes, section 2, it is provided that the Code of Civil Procedure, relative to justices of the peace, shall, where no specific provision is made by that subdivision, apply to the proceedings in all civil actions prosecuted before such county court. This is the same section which confers upon the county court jurisdiction concurrent with the district court in all civil cases not exceeding one thousand dollars, except upon certain specific subjects. By section 11 of the same chapter it is provided that where the amount exceeds the jurisdiction of the justice of the peace, motions and demurrers shall be allowed, and the rules of practice concerning pleadings and

processes in the district court shall be applicable, as far as may be, to pleadings in the county court. This section is a specific provision changing the general rule established by section 2 only in regard to pleadings and processes. By section 16, orders for arrest and for attachment may issue from the county court, and where the demand exceeds the jurisdiction of a justice, the proceedings upon such orders shall be the same, as near as may be, as in the district court. This section makes the proceedings upon orders of attachment analogous to those of the district court, but has no reference to proceedings in the district court to review such orders. By section 26 it is provided that in civil actions either party may appeal or prosecute a petition in error in the same manner as provided by law in cases tried and determined by justices of the peace. Section 31 provides that the county judge shall keep a docket in which all of his proceedings in civil actions shall be entered, in like manner, as near as may be, as before justices of the peace, and that the provisions of the Code relating to justices' dockets shall, as near as may be, apply to the docket of the county judge. This section should be construed in connection with section 1086 of the Code, which provides specifically what shall be entered upon the dockets of justices. Among other things so required to be entered is the affidavit upon which an order of attachment is made, and also exceptions to the rulings of the justice on questions of law; but this latter provision, taken in connection with its context, shows that it applies to cases tried by a jury.

“The result of the statutes so far is that the procedure in the county court in all civil actions must conform with the procedure before justices of the peace, except in certain particulars specially provided by the statutes, and not embracing bills of exceptions; and that the record of a proceeding in the county court must contain the affidavit upon which an attachment is founded, but not the affidavits or proof used on the hearing of a motion to dissolve such at-

tachment. Such affidavits cannot, therefore, be considered in error proceedings unless embodied in a bill of exceptions, and they cannot be embodied in a bill of exceptions unless the law authorizes such a bill.

“In *Taylor v. Tilden*, 3 Neb., 339, Judge GANTT reviews the statutes upon the subject, and holds that the provision allowing justices of the peace to sign bills of exceptions embodying questions of law arising during a trial by jury is exclusive, and that there is no authority for a bill of exceptions in other cases. He says that ‘the petition in error brings up to the appellate court a judgment or decision of the inferior court together with a transcript of the record, and bills of exceptions constitute no part of such record unless made so by some statutory provision.’ This case was reaffirmed in an opinion by Judge LAKE in *Kellogg v. Huntington*, 4 Neb., 96, and the same rule of construction was followed in *Nickerson v. Needles*, 32 Neb., 230, and in *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb., 90. In the latter case it was held that the authority for a bill of exceptions was so restricted that such bill could be made to embody only the rulings of the justice upon questions of law arising during a trial by jury, and did not permit the preservation of all the evidence in order to permit a review upon the ground that the verdict was not sustained by the evidence.

“The first authority for a bill of exceptions is found in the statute of 13 Edward I, chapter 31. The purpose of that statute, as well as all other statutes upon the subject, was to provide a method for bringing into the record what otherwise would not appear there. These statutes have received a uniformly strict construction, as may be seen from an examination of the cases cited in 1 Troubat & Haly, Practice, 570 *et seq.* They have never been extended beyond their letter. It cannot be argued that the authority to have the case reviewed on error implies an authority to have a bill of exceptions settled, because cases were re-

viewed on error long before such a thing as a bill of exceptions was known; and cases are now reviewed in this court, and in others, where error appears upon the record, without the aid of a bill of exceptions.

"It is also urged that the right to a bill of exceptions should be implied from sections 586 and 587 of the Code. Section 586 requires the plaintiff in error to file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed. Section 587 provides that county judges, justices of the peace, and others, upon request and upon being paid the lawful fees therefor, shall furnish an authenticated transcript of their proceedings, including the judgment or final order. The term "transcript" implies that the document referred to shall be a copy of some original document, and the language, taken in connection with chapter 20, section 26, above referred to, and other sections relating to the filing of transcripts in the district court, plainly refers to a transcript of the entries required to be made upon the docket, and does not require a transcript of all papers filed or of all evidence offered in the case. We think, therefore, that there is no authority of law for the county judge to sign a bill of exceptions embodying affidavits used as evidence on motions to dissolve an attachment. We regard the Nebraska cases cited as decisive of this question. Even were we convinced that the earlier cases were wrong, we would hesitate to overrule so long a line of authority, especially upon a question of practice where it is perhaps more important that the law should be stable and certain than that it should be right. It is probable that the legislature intended to make findings of fact in the court of first instance decisive upon such matters, and that that policy accounts for the omission. At any rate it is the legislature, and not the courts, which should supply the omission. In the long line of decisions directly or indirectly affecting this question there are but two cases which cast any doubt upon the correctness of the conclu-

sions we have reached. One is *Walker v. Morse*, already cited, where this court held that such a bill of exceptions should not have been quashed in the district court because the motion to quash the same was not sufficiently specific. It is plain from an inspection of that case that the motion was urged upon some technical ground not expressed in the motion, and that the attention of the court was not challenged to the question now before us. The other is *Osborne v. Canfield*, 33 Neb., 330, where the distinction between the right to review a judgment on error and the right to a bill of exceptions was evidently overlooked. We cannot regard those cases as overruling all the others upon the subject. The district court erred in overruling the motion to quash."

I fully concur in the conclusion reached by Commissioner IRVINE. His argument in support of the proposition that a county judge is without authority to settle a bill of exceptions embodying the evidence adduced on the hearing of a motion to vacate an attachment is, to my mind, unanswerable. In what I shall say upon the subject I shall refrain from going over the ground covered by that opinion.

The chief justice says, in substance, that the decisions of this court in *Taylor v. Tilden*, 3 Neb., 339, and *Kellogg v. Huntington*, 4 Neb., 96, holding that a bill of exceptions cannot be taken from the ruling of a justice, except in cases tried to a jury, have been adhered to, and are the law of this state, but these "cases rest, to some extent, upon the ground that an adequate remedy is given by appeal." An examination of the opinions in the cases mentioned fails to disclose that either was predicated upon the fact that there existed a remedy by appeal. On the contrary they are placed squarely upon the ground that there is no statute in this state authorizing a county judge or justice of the peace to allow a bill of exceptions in a case, unless such cause is tried by a jury. The right to a bill of exceptions is purely statutory, and where it is not authorized by law, a party is

not entitled to one. GANTT, J., in the first case says: "The statute does not give the right of a bill of exceptions to the ruling of the probate judge, or justice of the peace, upon questions of law arising during the trial before them, in cases not tried before a jury, and hence, such bill of exceptions cannot be considered in an appellate court, because it is an act without authority of law, and a nullity." That action, like this, was commenced in the county court, and the decision ought to be decisive of the question under consideration. The same doctrine has been held and applied in *Kellogg v. Huntington*, *supra*; *Rudolf v. Winters*, 7 Neb., 125; *Burlington & M. R. Co. v. Dick*, 7 Neb., 244, besides the two cases in 32 Neb., cited by Commissioner IRVINE.

The supreme court of Ohio, in *Baer v. Otto*, 34 O. St., 11, has placed the same construction upon the statute of that state. In that case the question arose whether a justice of the peace has any power to sign a bill of exceptions containing the evidence taken before him on the hearing of a motion to discharge an attachment, and the court in the opinion say:

"In the case now before us, it might be said that there is no such preponderance of evidence against the order refusing to discharge the attachment as would justify its reversal.

"But, in order to settle the practice in such cases, we now decide that there is no provision made by legislation, as it now stands, for preserving the evidence offered on such motion, or for reviewing the decision of the justice, upon the ground that such order, either in granting or refusing the motion, is contrary to the evidence.

"The statute prescribing the contents of a justice's docket (section 203 of the Justices' Code; S. & C., 804, 805) does not require any evidence to be recorded. And the only statute which authorizes a bill of exceptions to be signed by a justice is the act of February 11, 1869 (66 Ohio L., 7), and the sole object of the bill of exceptions provided

for in this act, is to authorize a review of the questions of law arising during a trial of the cause before the justice."

After the decision in *Baer v. Otto, supra*, the legislature of Ohio passed a law authorizing a bill of exceptions where an order discharging or refusing to discharge an order of attachment is made. (Revised Statutes of Ohio, sec. 6524.)

There is no room for doubt that it is the settled law of this state that a justice of the peace is not authorized to sign a bill of exceptions preserving the testimony on which he acted in sustaining or overruling a motion to dissolve an attachment; and the above opinion of the commissioner satisfies the writer that the rule is the same in such cases in the county courts. Such has been the scope of the decisions in cases originating in county courts, and that too where the amount exceeded the jurisdiction of a justice of the peace. (See *Rudolf v. Winters, supra*, and *Nickerson v. Needles, supra*.)

Had this suit originated in the district court, and the motion to discharge the attachment been there made and the same had been either sustained or denied, the defeated party, it is true, would have been entitled to have the evidence taken on the hearing incorporated in a bill of exceptions. The power of the district court to sign bills of exceptions is not limited to cases tried to a jury; but the statute confers ample authority upon that court to sign a true bill in all cases, whether tried to a court or to a jury; and it is no argument to say that because the attaching creditor, where the attachment is discharged by the district court, may have the evidence preserved by a bill of exceptions, another party in a similar case, upon a like ruling made by the county court, is likewise entitled to a bill of exceptions. The authority of the two courts to settle and allow bills of exceptions rests upon entirely dissimilar statutory provisions.

Attention has been called to section 236e of the Code. We cannot yield assent to the proposition that said section,

either in express terms or impliedly, confers the power for settling a bill of exceptions in any case, or the right to review the order of the court discharging an attachment. That the section was not passed by the legislature for any such purpose is clearly manifest from a reading of the language of the provisions, as well as the purpose of the act expressed in the title. The act is entitled "An act to provide for the retention of attached property pending a review on error of an order discharging the attachment." The object named in the title is carried into the body of the statute. As was said by the present chief justice in his opinion in *Adams County Bank v. Morgan*, 26 Neb., 149, in considering section 236e of the Code, "this section applies alone to the retention of the lien of the attachment; that is, if the attaching creditor desires to retain his attachment lien upon the property attached until the ruling on the motion to discharge can be reviewed in the appellate court, he must, within such time as the court shall fix, not exceeding twenty days, give an undertaking to the adverse party, with approved sureties, in double the appraised value of the property, conditioned," etc. It cannot be doubted that the sole purpose the legislature had in adopting the section under consideration was to provide for preserving the lien of the attachment pending the review of the order dissolving the attachment in the appellate court. The act confers no authority, nor does it attempt so to do, to prosecute error from the ruling of the court in sustaining or vacating an order of attachment. Such power already existed at the time the section became a law. The discharging of an attachment is a final order, and is reviewable under sections 581 and 582 of the Code. (*Turpin v. Coates*, 12 Neb., 321.) Even though it should be held that section 236e confers the right to review the ruling on a motion discharging an attachment and to the evidence upon which the decision is based, the section has no application to the case at bar, since the county court did not dissolve the attachment, but sus-

tained the writ. By no process of reasoning can it be held that the section authorizes a county judge to sign a bill of exceptions where the attachment is upheld. The section applies alone to cases in which the attachment is discharged.

Mention has been made of the writ of *certiorari*, and it is claimed that under such a writ a party at common law was entitled to bring up for review both the evidence upon which the inferior tribunal acted and the question of jurisdiction. We concede that section 599 of the Code confers upon courts the same power to compel the proceedings of an inferior tribunal to be brought up for review as existed at common law, and that by section 901 of the Code the common law remedies are continued in force in this state, where the Code has failed to provide a remedy. But we are unwilling to admit that as a general rule a court upon a common law writ of *certiorari* will examine the evidence for the purpose of determining whether it sustains the judgment sought to be reviewed. It is my understanding that the office of a common law *certiorari* is only to bring up for review the question of jurisdiction or power, and errors on the face of the record, and that the reviewing court will not inquire whether the decision of the inferior tribunal was right, upon the merits. (*Corrie v. Corrie*, 42 Mich., 509; *Hyslop v. Finch*, 99 Ill., 171; *Rawson v. McElvaine*, 49 Mich., 194; *Central P. R. Co. v. Placer County*, 43 Cal., 365; *Ex parte Nightingale*, 11 Pick. [Mass.], 168; *McAllilley v. Horton*, 75 Ala., 491; *Rayner v. State*, 52 Md., 368; *Lapan v. Commissioners of Cumberland County*, 65 Me., 160; *De Rochebrune v. Southeimer*, 12 Minn., 78; *Conover v. Davis*, N. J. Law, 112; *In re Kensington & Oxford Turnpike Co.*, 97 Pa. St., 260.) There is considerable conflict in the authorities upon the question, but we think the rule just stated is the scope of *certiorari* as applied to judgments of justice courts, and other similar tribunals. (*Frederick v. Clark*, 5 Wis., 191; *Baizer v. Lasch*, 28 Wis., 268; *Smith*

*v. Bahr*, 62 Wis., 244; *Owens v. State*, 27 Wis., 456; *State v. Huck*, 29 Wis., 202; *Paulsen v. Ingersoll*, 62 Wis., 312; *Callon v. Sternberg*, 38 Wis., 539; *Milwaukee Iron Co. v. Schubel*, 29 Wis., 444; *Driscoll v. Smith*, 17 N. W. Rep. [Wis.], 876; *Tiedt v. Carstensen*, 61 Ia., 334; *Healy v. Kneeland*, 48 Wis., 497; *Schall v. Bly*, 43 Mich., 401; *Carver v. Chapell*, 37 N. W. Rep. [Mich.], 879.)

In *State v. Huck*, *supra*, a justice of the peace, under a writ of *certiorari*, certified up all the evidence, as well as the record, to the circuit court, where the judgment of the justice was reversed as being against the evidence. On error to the supreme court the judgment of the circuit court was reversed, and that of the justice affirmed; the court holding that upon *certiorari* issued to a justice of the peace, only jurisdictional errors and defects disclosed by the record would be examined.

In *Carver v. Chapell*, *supra*, plaintiff sued out an attachment. The writ was dissolved on motion of the defendant. The supreme court of Michigan held, on review of the case, that on *certiorari* it would not review the facts or pass upon the weight of the testimony upon which the lower court based its ruling.

In *Milwaukee Iron Co. v. Schubel*, *supra*, Cole, J., in speaking of *certiorari*, says: "In this state the common law writ has almost invariably been brought to review the proceedings and judgments of justices of the peace; and this court has, with much uniformity, declined to consider upon such writ any but jurisdictional questions, or such questions of law as might arise upon the docket entries of the justice. The court has refused to try the merits of the action by a common law writ, or to examine any alleged error of the justice in his rulings on the trial, or to consider any objection which involved an inquiry into the evidence. There was no way provided by which such decisions and rulings became a matter of record; and, besides, an adequate remedy was afforded for a review of these judicial

acts by means of the statutory writ of *certiorari* or by appeal."

It is perfectly plain that *certiorari* will not lie where the statute affords a remedy by error or appeal. The decision of a justice of the peace, or county court, in sustaining or dissolving an attachment can be reviewed by proceedings in error. True, the ruling of said courts on a motion to discharge an attachment cannot be reviewed on the ground that the decision is against the weight of the evidence; but that is not the fault of the court, but of the law, in failing to provide for preserving the evidence by a bill of exceptions. *Osborne v. Canfield*, 33 Neb., 330, is overruled. In the case we are considering, the district court reversed the decision of the county court upon the ground that it was contrary to the evidence. As the bill of exceptions was without authority of law, the district court erred in not quashing the same. It follows that the judgment of the court below should be reversed, and that of the county court affirmed.

REVERSED.

MAXWELL, C. J., dissenting.

This cause was submitted to the commission, and a decision of a majority of that body not conforming to the views of this court upon one point, it is necessary to state the law upon the subject, as I understand it. The action was brought by the plaintiff against the defendants in the county court by attachment. The defendants thereupon filed a motion to dissolve the attachment and supported the same by various affidavits. It was also claimed that the affidavit of one Croy, the agent of the plaintiff, was insufficient and an amendment was permitted. On all these questions the opinion of the majority of the court, in my view, is right. The county court sustained the attachment. The cause was taken on error to the district court and a bill of exceptions, duly signed, containing the affidavits and

evidence submitted on a motion to dissolve the attachment. A motion was made in the district court to strike the bill of exceptions from the files because there was no authority of law for the granting of the same. The motion was overruled, and the attachment was sustained. The ruling of the court is the principal question involved.

Section 236e of the Code provides: "That when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court, or judge, shall fix the number of days, not to exceed twenty, in which such party may file his petition in error, during which time the property attached shall be held by the sheriff or other officer, during which period the petition in error shall be filed, and the party filing the same shall give an undertaking to the adverse party, with surety or sureties, to be approved by the court, in double the amount of the appraised value of the property attached, conditioned to pay said adverse party all damages sustained by such party in consequence of the filing of said petition in error in the event that such order of attachment shall be discharged by the court, in which said petition in error shall be filed, as having been unlawfully obtained." This provision of the Code was adopted in 1873, and applies to all cases of attachment where an order is made discharging the same. Now is it possible that in a certain case the attaching creditor may, when the attachment is discharged, have the evidence on which he predicates his right preserved in a bill of exceptions and in a similar case in another court would be denied that privilege? It is true in an early day in the judicial history of the state this court held that a bill of exceptions could not be taken from the ruling of a justice of the peace in cases not tried by a jury. (*Taylor v. Tilden*, 3 Neb., 339; *Kellogg v. Huntington*, 4 Neb., 96.) Those decisions have been adhered to and are the law of this state. These cases rest to some extent upon the ground that an adequate remedy is given by appeal. They refer to causes

tried before a justice of the peace upon the merits. In my view, they do not refer to special proceedings, as by attachment. In such case the only mode of review provided in the Code is on error. This is expressly provided for; but how can the case be reviewed unless the evidence upon which it was heard in the trial court is carried up to the reviewing court? The authority to review the action of the trial court carries with it the right to have all the testimony before the reviewing court. Otherwise, the right of review would be a vain proceeding, a delusion, and mockery of justice. As I understand the rule, statutes are, if possible, to be so construed as to give them force and effect, and not to annul their operation.

Section 16, chapter 20, Compiled Statutes, provides: "Orders for arrest and for attachments of property may issue in actions brought under this chapter, but when the demand in such action exceeds the jurisdiction of a justice of the peace, the proceedings upon such orders shall be the same, as near as may be, as in actions brought in the district court. The return day of such orders shall, when issued at the commencement of the action, be the same as that of the summons; when issued afterwards, they shall be made returnable forthwith." In the case at bar the amount involved amounts to nearly \$900, and the statute declares that where the amount exceeds \$200 "the proceedings upon such orders *shall* be the same, as near as may be, as in actions brought in the district court." What orders? All orders for arrest or attachments. Now by what authority does the court limit the word "proceedings"? All proceedings relating to the attachment, as I understand the meaning, include all that is done in relation to the same in the county court. If the case was tried in the district court, the preparation and signing of a bill of exceptions would be a part of the proceedings in that court. Is not the same true where the action is brought in the county court, where the amount involved exceeds \$200? I be-

lieve the construction placed upon this language is forced and unnatural, and not only works injustice in the case at bar, but is calculated to do injustice. The precise question here involved was before this court in *Osborne v. Canfield*, 33 Neb., 330; and it was held by a unanimous court that a county judge "may sign a bill of exceptions in any case where an attachment has been discharged by him." That question was the principal one presented in that case, and the right was sustained, and the rule should be adhered to.

But let us suppose that the Code provides no remedy. Then we have recourse to the remedies which existed under the former practice. Section 901 of the Code provides: "Rights of civil action given or secured by existing laws shall be prosecuted in the manner provided by this Code, except as provided in the following section. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this Code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." Under the former practice a writ of *certiorari* would be issued to certify up the record where there was no remedy by appeal or writ of error. All attachment proceedings in this state are purely statutory, and if no other remedy exists, are reviewable by *certiorari*. (*Hartshorn v. Wilson*, 2 O., 28; *Learned v. Duval*, 3 Johns. Cas. [N. Y.], 141; *Dougan v. Arnold*, 4 Dev. L. [N. Car.], 99; *Branson v. Shinn*, 13 N. J. Law, 250; *Wilson v. Ray*, T. U. P. Charlt. [Ga.], 109; *Fryer v. Blackmore*, 1 Murph. [N. Car.], 94; 2 Spelling, Extraordinary Relief, sec. 1939.) It is very clear to my mind that the parties are entitled to have the record certified up, and that the judgment of the court below is right and should be affirmed.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1894.

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PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.\*

HON. T. L. NORVAL, CHIEF JUSTICE.

HON. A. M. POST,  
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,  
HON. JOHN M. RAGAN, } COMMISSIONERS.  
HON. FRANK IRVINE, }

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38	539
62	471

GEORGE KARLL, CONSTABLE, V. ROBERT E. KUHN.

FILED JANUARY 2, 1894. No. 5654.

**Fraudulent Conveyances: RIGHTS OF CREDITORS: NOTICE TO PURCHASERS: EVIDENCE.** In an action which involved the good faith of the purchaser of an entire stock of goods of the value of \$4,500, which were paid for by the transfer of eight lots in an addition to Sioux City, of the alleged value of \$2,400, to the seller's wife, and the remainder in notes of third parties, having some time to run, *held*, that the proof and instructions were too much restricted to submit the matter in full to the consideration of the jury.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

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\* Term expired January 3, 1894.

*McCabe, Wood & Elmer*, for plaintiff in error, cited: *Kaine v. Weigley*, 22 Pa. St., 179; *Kersenbrock v. Martin*, 12 Neb., 374; *Fitzgerald v. Meyer*, 25 Neb., 77; *Wasson v. Palmer*, 13 Neb., 376; *Beels v. Flynn*, 28 Neb., 575; *Judson v. Courier Co.*, 15 Fed. Rep., 541; *Reed v. Ma-ben*, 21 Neb., 695.

*Davis, Gantt & Briggs, contra*, cited: *Thornburgh v. Hand*, 7 Cal., 554; *Noble v. Holmes*, 5 Hill [N. Y.], 194; *Van Etten v. Hurst*, 6 Hill [N. Y.], 311; *Ma'hews v. Densmore*, 43 Mich., 461; *Williams v. Eikenberry*, 25 Neb., 721; *Schars v. Barnd*, 27 Neb., 94; *Bartlett v. Cheesebrough*, 32 Neb., 340.

MAXWELL, C. J.

On the 29th day of January, 1890, plaintiff in error, as constable, seized the property in controversy as that of W. C. Ryan, defendant in attachment, at the suits of Darrow & Logan, Schneider & Loomis, and J. T. Robinson Notion Company, under three orders of attachment; the demands of these plaintiffs, subsequently reduced to judgment, being \$99.25, \$415.92, and \$235.80, respectively. The day following the levy the defendant in error seized the property under an order of replevin issued from the district court of Douglas county, averring ownership by purchase from W. C. Ryan prior to the issuance of the attachments. The plaintiff in error justified under his orders of attachment and alleged that the purchase by R. E. Kuhn from W. C. Ryan was in fraud of the latter's creditors, and upon this issue the case was tried and a verdict rendered in favor of Kuhn for the sum of \$43.70. This sum the court required the plaintiff to remit, which was done, and judgment was entered in favor of Kuhn for five cents damages.

The testimony shows that in 1883 Kuhn began the banking business in Emerson, about eighty miles from Omaha,

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Karl v. Kuhn.

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removing to South Omaha in 1889. From 1884 or 1885 he was acquainted with W. C. Ryan, who, until 1887 or 1888 was a farmer living five or six miles from Emerson. In the latter part of 1887, or early part of 1888, Ryan moved to Emerson, and, in partnership with one Clark, opened a country store, Kuhn being banker of the firm. In the fall of 1888 Clark retired. Ryan continued the business, his father and one Berben indorsing his paper for goods bought and unpaid for to the amount of \$3,000. In January, 1890, Ryan was insolvent, but continued to do business and purchased the goods in question on credit. The debt of Darrow & Logan was about due; that of J. T. Robinson Notion Company was overdue, while the Schneider & Loomis claim had not yet matured, January 27, 1890. Ryan owed, on January 27, 1890, for goods bought, \$2,400, on paper indorsed by his father and another in October, 1888, \$3,000; mortgage indebtedness, \$3,200.

In 1889 Kuhn started, in South Omaha, a grocery store. A few days prior to January 27, 1890, Ryan approached him with a proposition to sell his stock, and an inventory was made without closing business, and that seems to have been known only to the parties engaged. This inventory could not be produced at the trial. Ryan continued in possession, selling goods as usual, until the close of business on the 27th, when he and Kuhn commenced packing, working all night, and for twenty-four consecutive hours, when the goods were shipped to South Omaha. Kuhn was to pay the cost price, less freight and a trifling reduction for damaged goods, for a stock adapted to a country trade, consisting of clothing, boots and shoes, hats and caps, dry goods, notions, hardware, groceries, etc. The amount of the stock is claimed to have been \$4,500. The only reason assigned for the sale was the intention of Ryan to remove to the farm. The consideration paid was eight lots in Sioux City, Iowa, at \$300 each, aggregating \$2,400; a note executed by one Spiker to Kuhn, not due for fourteen months, \$1,080; a

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similar note executed by one Rhoady, \$680, without security, and a note of one Rhoady not due for two or three years; a note executed by one Beringhoff, \$267. About \$75 interest had accumulated on these notes. On the 27th Kuhn and Ryan went to Sioux City, where deeds to Mrs. Ryan were executed for the lots there, but were not delivered until the bill of sale for the stock was executed that evening. They did not start from Sioux City until 4 P. M., but between 7 and 8 P. M. of that day a messenger filed with the recording officer at Ponca, eighteen miles distant, a bill of sale of the stock, and a deed to Ryan's father for a half section of land. This messenger was Kuhn's, who was then in possession of the stock.

The defendants offered in testimony a duly certified copy of a warranty deed executed by Kuhn and wife to Mrs. M. A. Ryan on the 11th day of January, 1890, and filed for record on the 27th day of January, 1890, at 7 o'clock P. M.

It certainly was relevant and material to inquire into the dealings between Kuhn and Ryan, and Ryan's wife, at or near the time when the testimony disclosed that Ryan was making a disposition of his property, and manifestly making a disposition of his property to his wife. The court, however, excluded this upon the theory that it had been executed, as appeared upon the face of it, some sixteen days prior to the conveyance to Kuhn. In this the court clearly erred. In a transaction of this kind all the facts relating to the transfer of the property, the consideration therefor and by whom paid, the manner of payment and to whom the transfer was made, may be proved to enable the jury to determine the true nature of the transaction.

In view of the many assignments of error it would consume too much space to particularize the specific errors. The court seems to have restricted the examination to too narrow limits, and again in the instructions to have restricted the inquiry as to the good faith of the transaction. The undisputed testimony shows that Kuhn had sufficient

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Rittenhouse v. Bigelow.

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notice that the goods were not paid for to put him upon inquiry, yet he aided in putting the property of Ryan in a position, the inevitable effect of which was, to hinder and delay, if not defraud creditors of Ryan. This he cannot do and be treated as a *bona fide* purchaser.

In *Beels v. Flynn*, 28 Neb., 575, it was held: "A purchaser of an entire stock of goods, all the property of the debtor, cannot close his eyes to the circumstances under which he purchases the stock and the probable effect the means of payment (in this case mostly a note of the purchaser) will have upon creditors of the seller in hindering, delaying, or defrauding them of the payment of their claims." What is said in that case is applicable in this, and all the facts and circumstances should be submitted to the jury, which they were not, either by the proof or the instructions. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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38	543
38	547

CHARLES C. RITTENHOUSE V. C. B. BIGELOW ET AL.

FILED JANUARY 2, 1894. No. 6477.

**Cities of the First Class: TOWNSHIP BOARDS: TAXATION.**

In cities which contain 10,000 inhabitants the taxes must be equalized by the town board, and the appointment of a clerk of such board is not illegal and unauthorized.\*

ORIGINAL application for injunction to restrain the collection of taxes.

*Tibbets, Morey & Ferris*, for plaintiff, cited: *South Platte Land Co. v. Buffalo County*, 7 Neb., 257; *Burlington &*

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Overruled. See following case, 38 Neb., 547.

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Rittenhouse v. Bigelow.

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*M. R. R. Co. v. Cass County*, 16 Neb., 138; *Touzalin v. City of Omaha*, 25 Neb., 817; *Earl v. Duras*, 13 Neb., 234; *Sutherland*, Statutory Construction, secs. 235, 237, 238.

*George H. Hastings, Attorney General, B. F. Smith, and W. P. McCreary, contra*, cited: *McGee v. State*, 32 Neb., 149.

MAXWELL, C. J.

This is an action brought by the plaintiff against the defendants to restrain the enforcement of a tax alleged to be void. Hastings is a city which, according to the last census, contained more than 10,000 inhabitants. The county of Adams is under township organization, and Hastings constitutes a township. On the 12th of July, 1893, the township board of Hastings appointed a clerk and treasurer, and taxes were thereupon levied on the property of the city to pay for the services of said officers, and these are the illegal taxes complained of.

Section 4, article 4, chapter 18, Compiled Statutes of 1893, provides: "That in wards of cities of the first and second class, whose limits are co-extensive with precincts, the electors thereof shall only choose supervisors, assessors, and judges and clerks of election." Section 5 of the same chapter provides: "No city of over 6,000 inhabitants shall be included within the corporate limits of any township, but the territory occupied by such city of over 6,000 inhabitants shall constitute a town by the name of such city for the purpose of town meetings and organization as hereinafter provided." Section 42 of the same is as follows: "Assistant supervisors, and supervisors elected in the cities of the first and second class, shall have no power or duties as town officers, but shall be members of the county board of their respective counties, and shall have and enjoy the same powers and rights as other members." Section 62 provides: "None of the provisions of this act in regard to

meeting of electors of their respective towns and their powers shall apply to towns whose limits are co-extensive with cities of the first and second class, but such cities and the inhabitants thereof shall continue to be governed by the laws specially applicable thereto, with such power only as conferred by law or election in the choosing of supervisors, assessors, judges and clerks of election, and other county officers."

Section 62, article 1, chapter 18, is as follows: "The county boards of the several counties in this state that may adopt township organization shall be composed of the supervisors of the organized townships thereof, and the supervisors from the cities of the first and second class and villages; such supervisors shall hold two regular meetings in each year at the county seat in their respective counties, for the transaction of general business as a board of supervisors. They may hold special meetings at such times as they may find convenient, and shall have power to adjourn from time to time as they may deem necessary. They may also hold such other meetings as are by law provided."

In 1891 the legislature amended the general election law by providing that "in counties under township organization one town clerk, one town treasurer, three judges and two clerks of election, one assessor, and one overseer of highways in each road district shall be elected annually thereafter; and two justices of the peace and two constables shall be elected at said election and every second year thereafter, except as hereafter in this section provided; and at said election one supervisor shall be elected in each township," etc. "In each city and village having 1,000 inhabitants or over, one supervisor for each 4,000 inhabitants therein, one assessor, three judges and two clerks of election."

Section 148, article 1, chapter 14, Compiled Statutes, provides: "That in all cities of the second class in the state in counties under township organization and in counties that may come under such organization, the city coun-

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Rittenhouse v. Bigelow.

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cil and supervisors of such cities shall constitute a board of equalization for such city, whose duty it shall be to meet and equalize the assessments of such city at the same time and in the same manner as now provided by law for townships in counties under township organization."

Section 62, chapter 77, is as follows: "In counties under township organization the assessor, with his assessment book and the schedules and statements of property by him assessed, together with the town board, shall meet on the first Monday of June, for the purpose of reviewing the assessment of property of said town. And on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to them just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, is a resident of the county." There is also a provision "that in each town the supervisor, town clerk, and justices of the peace of the town shall constitute the town board." It will thus be seen that there is no special provision for equalizing assessments in cities of the first class, which Hastings is. Section 62, chapter 77, therefore provides the only mode for equalizing taxes in cities of the first class having 10,000 inhabitants. The plaintiff, therefore, is not entitled to any relief, so far as the action relates to the clerk, and the action is

DISMISSED.

## CHARLES C. RITTENHOUSE v. C. B. BIGELOW ET AL.

FILED APRIL 3, 1894. No. 6477.

1. **Cities of the First Class: TOWNSHIP BOARD: TAXATION.**

There is no authority of law for the election, appointment, or existence of a township board, nor for the election or appointment of a township treasurer or township clerk in a township, when such township is a city of the first class having more than ten thousand and less than twenty-five thousand inhabitants.

2. *Rittenhouse v. Bigelow*, 38 Neb., 543, overruled.

REHEARING of preceding case, 38 Neb., 543.

RAGAN, C.

This is a rehearing of *Rittenhouse v. Bigelow*, 38 Neb., 543, an action brought originally in this court, and decided January 2, 1894. The suit was brought to perpetually enjoin the county clerk and county treasurer of Adams county from extending upon the public records and collecting certain taxes levied by an alleged township board of Hastings township. Adams county is under township organization; the city of Hastings is situate therein, and is a city having more than ten thousand and less than twenty-five thousand inhabitants, and such city constitutes Hastings township.

The sole question presented by the record in this case is: Is there any authority of law for the existence of a township board in Hastings township? If no express statutory provisions existed affording a negative answer to the question, we are of opinion that the statutes governing cities of the subclass to which the city of Hastings belongs, and article 4, chapter 18, Compiled Statutes, 1893, the township organization act, would afford such a negative answer without a strained construction of such statutes by the courts. The object of township organization law is to

enable the people of every locality to make rules and regulations for the government of affairs, local in their nature. These rules and regulations, or by-laws, as they are sometimes called, in townships are framed by the people in their collective capacity at meetings called for that purpose; while the rules and regulations, or ordinances, governing cities of the subclass to which the city of Hastings belongs are framed by delegates or councilmen chosen by the electors of such cities. In a township containing a few hundred inhabitants it is entirely practicable for the voters in their collective capacity to frame such by-laws as they may think will best regulate their local affairs; but this legislation by voters collectively would be wholly impracticable in a city of ten thousand inhabitants.

But we do not have to depend upon a construction of the statutes aforesaid for an answer to the question raised by this record. By section 4, article 4, of said chapter 18 it is provided that the electors in wards of cities of the first and second class, whose limits are co-extensive with a precinct, shall only choose supervisors, assessors, and judges and clerks of election. By section 5 of said article and chapter it is provided that no city of over six thousand inhabitants shall be included within the corporate limits of any township, but that the territory embraced within said city shall constitute a township by the name of said city. By section 42 of said article and chapter it is provided that the supervisors elected in cities of the first class shall have no power or duties as township officers, but shall be members of the board of supervisors of the county; and by section 62 of said article and chapter it is declared that none of the provisions of the act in regard to the meeting of electors of the various townships shall apply to townships whose limits are co-extensive with cities of the first and second class; but that such cities and inhabitants thereof shall continue to be governed by the laws specially applicable thereto; reserving, however, to such cities the

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Rittenhouse v. Bigelow.

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power of choosing supervisors, assessors, judges and clerks of election, and other county officers. These sections of this township law need no construction. They speak for themselves; and it is perfectly clear that the legislature never intended that the municipal or local affairs of a city of the subclass to which Hastings belongs, though made a township, should be conducted by a township board. It is true that the act speaks of cities of the first and second class, and the city of Hastings is a city of the first class having more than ten thousand inhabitants and less than twenty-five thousand inhabitants; but the city of Hastings did not cease to be a city of the first class because subclassed as one having more than ten thousand inhabitants. There is no authority of law for the election, appointment, or existence of a township board as such, nor for the election or appointment of a township treasurer or township clerk in a township, when such township is a city of the first class having more than ten thousand and less than twenty-five thousand inhabitants. It follows that the levy of taxes made by the township board of Hastings township is void. The former opinion of this court is reversed, and a decree will be entered perpetually enjoining the county clerk and county treasurer of Adams county from extending upon the books of their office and collecting any of the taxes sought to be levied by the said alleged township board of Hastings township.

DECREE ACCORDINGLY.

Post, J., not sitting.

38	550
412	303

**BRETTA SVANSON V. CITY OF OMAHA.**

FILED JANUARY 2, 1894. No. 5387.

**Municipal Corporations: DAMAGES BY CHANGING GRADE OF STREET.** After the grade of a street had been established a lot-owner adapted his building on his lot to conform to the grade. Afterwards a new grade was established, by reason of which the front of his building was left more than fifteen feet above the street. *Held*, That a clear preponderance of the evidence showed that the damages to the property greatly exceeded the special benefits.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

*B. G. Burbank*, for plaintiff in error.

*W. J. Connell* and *E. J. Cornish*, *contra*.

MAXWELL, C. J.

The plaintiff in June, 1890, was the owner of the south half of lot 15, in block 8, in Kountz & Ruth's addition to Omaha, and had erected thereon a large wooden building, nearly two stories in height, with a brick basement. It appears from the evidence that the grade was established in 1883 and a change made in 1887, and she built a basement wall under the house to adapt it to the change of grade of 1887; and the front of the house seems to have been but two or three feet above the level of the street. In June, 1890, a new grade was established, by which the street in front of the house was cut down fifteen and one-half feet. The persons appointed to appraise the damages allowed the plaintiff nothing, and on appeal to the district court the award was affirmed.

On the trial of the cause David Smeaton testified that the property, before the change of grade, was worth \$4,500,

and from \$3,000 to \$3,200 afterwards. Anthony Johnson testified to substantially the same facts. E. F. Seaver testified that the property was worth about \$4,150 before the grading and about \$2,900 afterwards. Mark A. Upton placed the value before the grading at \$4,500, and after the grading at about \$3,000. Otto Johnson testified that the property was worth before the grading about \$4,500, and after such grading about \$3,000. These men are shown to have been well acquainted with the value of real estate in Omaha at the time stated. The defendant called three witnesses, two of whom were in its employment, one apparently being a professional appraiser, if not a professional witness, who testified, in substance, that the special benefits were about equal to the damages. When required to particularize as to the benefits they failed to show special benefits that were of any great value. None of these witnesses testified to facts that showed that the property would be worth more after the grading, and the lot and building lowered to grade, than it would be before the change of grade. This would seem to be the test. Is the property, taken as a whole, deducting the cost of lowering the buildings, diminished in value by the improvement? If it is, the owner should be compensated for the diminution in value.

It is very desirable and commendable even for a city, within reasonable limits, to improve its streets, but it is of equal importance to protect the rights of its citizens. When a grade is established, a lot owner on such street may justly assume that it was made in good faith, and may build according to grade or raise or lower his buildings to conform to the grade. If the grade is thereafter changed so that his buildings are left on top of a high bank, it would seem but justice that he should be paid for lowering the same to the second grade, unless the special benefits are clear and manifest and fully equal the damages. If damages for a material change of grade made from time to time can be paid

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Stanwood v. City of Omaha.

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for in alleged benefits, it is possible to bankrupt persons of moderate means or greatly injure their financial ability, and they may be required, at the whim or caprice of a municipal council, to raise or lower their buildings to conform to changes which are often unnecessary. The true policy of every municipality and community is to deal justly with all property owners within its boundaries. If the public require the use of private property, or that it shall be damaged for public use, why should not the party who requires this sacrifice for its own benefit bear the burden and pay for the injury? This might impose a slight burden on all the tax-payers, but would be more than compensated by the assurance to every property owner that if his property was taken or injured for public use he would be duly compensated for the injury. In the case at bar the proof clearly shows that the plaintiff has been greatly injured in excess of the special benefits shown by the proof. The verdict, therefore, does not respond to the evidence, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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38	552
049	304
38	552
57	568

SARAH N. STANWOOD V. CITY OF OMAHA.

FILED JANUARY 2, 1894. No. 5639.

On an appeal from an award of damages for the construction of a viaduct it appeared from the proof that the damages were grossly inadequate. The verdict and judgment, therefore, are set aside and the cause remanded for further proceedings.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

*Charles B. Keller*, for plaintiff in error.

*W. J. Connell* and *E. J. Cornish*, contra.

MAXWELL, C. J.

This is a petition in error to review the judgment of the district court of Douglas county on an award of damages to the plaintiff for injuries to lot 4, block 204, in the city of Omaha, by the erection of the viaduct on Tenth street in said city. The lot in question has a frontage on Tenth street of 132 feet, and on Leavenworth street of sixty-six feet. The viaduct at the point indicated is about thirty feet above the street. The verdict below was \$500, in favor of the plaintiff.

The principal objection is that the verdict is against the weight of evidence, the amount of the award being greatly beneath the damages proved. W. V. Morse, a witness in the case, placed the value of the lot before the construction of the viaduct, in round numbers, at \$59,000, and afterwards \$31,000. J. B. Carmichael at \$49,000 before and \$24,000 afterwards. George C. Ames placed the value before at \$46,000, and afterwards at \$23,000. Lewis S. Reed placed the value before at \$39,000, and after such construction at \$26,000. George Hobbie placed the value before at \$66,000, and after the erection at \$33,000. John T. Dillon placed the value before at \$52,000, and after the erection at \$26,000. These witnesses are shown to be well acquainted with the value of real estate in Omaha, and in that particular part of the city, and we do not think this testimony is overcome by that on behalf of the city. But the testimony as to the rental of the buildings is much stronger in favor of the plaintiff. Before the erection of the viaduct the plaintiff received as rental for the ground alone the sum of \$1,200, the taxes being paid by the lessee, and the lessee sublet the premises for nearly or quite twice that sum; but after the erection of the viaduct the rents were greatly reduced, more than one-half, and it was difficult to find paying tenants even at the reduced rate. These facts show that the property has been greatly injured for

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Dodge County v. Kemnitz.

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either sale or lease, and that \$500 is a grossly inadequate sum for the damages sustained. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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DODGE COUNTY V. CHARLES KEMNITZ.

FILED JANUARY 2, 1894. No. 4391.

38 554|  
62 427n|

**Bastardy: BOND FOR SUPPORT OF CHILD: JUDGMENT.** When for the deceased mother of a bastard child the proper county has been substituted as complainant in proceedings under chapter 37, Compiled Statutes, the judgment and order of the court, upon a verdict of guilty, should require defendant to "give security to save the county harmless from any expense which may be incurred in the support of said child."

REHEARING of case reported in 32 Neb., 238.

*C. Hollenbeck and George L. Loomis*, for plaintiff in error.

*Frick & Dolezal, contra.*

MAXWELL, C. J.

This action was brought by Lena Martin against Kemnitz as the father of her bastard child. The mother died while the action was pending, and the county of Dodge was substituted as plaintiff on the trial. The defendant was found guilty. Upon error proceedings in this court this judgment was affirmed (32 Neb., 238). A motion for a rehearing was afterwards sustained, and there is upon such rehearing presented but one question for consideration, and that is the sufficiency of the bond required by the judgment of the district court. The condition of the bond prescribed was that the defendant "will save the county of

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Dodge County v. Kemnitz.

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Dodge free from all expense on account of the support of said bastard child." COBB, J., delivering the opinion of this court on a former review of this case (28 Neb., 224), said that though the action had been revived in the name of Dodge county, every proceeding should be governed, so far as is required, by the same provisions and rules of law as though it had never abated.

Section 6, chapter 37, Compiled Statutes, provides "that in case the jury find the defendant guilty, or such accused person before the trial shall confess in court that the accusation is true, he shall be adjudged the reputed father of said child, and shall stand charged with the maintenance thereof in such a sum or sums as the court may order and direct, with payments of costs of prosecution, and the court shall require the reputed father to give security to perform the aforesaid order, and in case the said reputed father shall neglect or refuse to give security as aforesaid, and pay the costs of prosecution, he shall be committed to the jail of the county, to remain until he shall comply with the order of the court." Section 2 of the same chapter provides "that, when any woman has a bastard child and neglects to bring a suit for its maintenance, or commences a suit and fails to prosecute to final judgment, the county commissioner, in any county interested in the support of any such bastard child, where sufficient security is not offered to save the county from expense, may bring a suit in behalf of the county against him who is accused of begetting such child, or may take up and prosecute a suit begun by the mother of the child." It will thus be seen that the county may prosecute "when sufficient security is not offered to save the county from expense." If a sufficient bond is given to save the county from expense in caring for the child, the putative father will be entitled to his liberty. In the case at bar such bond seems to have been given. The judgment is therefore

AFFIRMED.

**DAVID P. FARQUHAR ET AL. V. LEWIS O. HIBBEN.****FILED JANUARY 2, 1894. No. 5644.**

1. **Exemptions.** The testimony sustains the claim of the debtor, that the property levied upon was exempt and not subject to sale upon execution.
2. **An inventory of all the property of a debtor, who describes his property in general terms as "three barrels of liquor, saloon and fixtures, and cigars, and stock, consisting of bar, liquors, glassware, and mirror, at No. 220 South Thirteenth street, Omaha," is not void. Although informal, the court will look at the substance, and hold it sufficient when it appears that all the property described was found at the place designated.**

**ERROR from the district court of Douglas county. Tried below before FERGUSON, J.**

*Cornish & Robertson, for plaintiffs in error.*

*E. W. Simeral and William Simeral, contra.*

**MAXWELL, C. J.**

On March 11, 1890, defendant in error filed his petition claiming of plaintiffs in error damages in the sum of \$350, and for his cause of action alleges that the plaintiff in error Farquhar was, at the time the defendant in error claimed to have been damaged, a constable in and for Douglas county, Nebraska, and that his co-plaintiffs in error were his bondsmen; that on the 24th day of February, 1890, an execution was issued on a judgment obtained in the county court of Douglas county, in favor of Riley & Dillon and against defendant in error, for the sum of \$300.92, and was placed in the hands of Constable Farquhar, who on said day levied the same upon three barrels of whiskey belonging to the defendant in error; that on the 7th of March, and before the time of sale of said property under said execution, the defendant in error made out and placed in the

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Farquhar v. Hibben.

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hands of said officer Farquhar an affidavit of exemptions. The petition also alleges that said affidavit contained a list of all the personal property of which the defendant in error was possessed, and that he demanded of said officer that the three barrels of liquor be released as exempt. In addition to the above, the petition contains the following allegation:

"5. Plaintiff further states to the court that said affidavit of exemptions shows, and plaintiff alleges the fact to be, that he, long prior to said levy or the issuing of said execution, (had) given a mortgage for the sum of \$2,000 upon all the property set forth in said affidavit; \* \* \* that notwithstanding said property was exempt by law in lieu of a homestead, said constable did, on the 8th day of March, 1890, sell said whiskey under said execution, to the damage of said plaintiff in the sum of \$350."

In answering, the defendants Thomas and Brennan adopt the answer of the defendant Farquhar. The defendant Farquhar first denies each and every allegation contained in the petition, except such as is specifically admitted in the answer. It is admitted that Farquhar was a constable, as alleged, and that his co-plaintiffs in error were his bondsmen. It is also admitted that an affidavit was filed with the officer by the defendant in error on the 7th day of March, 1890, but denied that the same gave a list of all the personal property of which the defendant in error was at that time possessed, and that he demanded said three barrels of whiskey as exempt. The answer also contains the following: "Defendant states that on the 4th day of March, 1890, after levy was made as aforesaid, and prior to the sale of said property under said execution, \* \* \* said plaintiff was the owner of seven barrels of whiskey, five thousand cigars (and other personal property described in the answer), \* \* \* which property, except the three barrels of whiskey levied upon by this defendant, was clear and free from all incumbrance and liens, and exceeded in value the sum of one thousand dollars;

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Farquhar v. Hibben.

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that on the 4th day of March, 1890, prior to filing any affidavit with this defendant, and prior to giving any notice whatever to this defendant that he intended to claim his exemptions, said plaintiff fraudulently, for the purpose of cheating and defrauding his creditors, and especially the plaintiffs in execution, and for the purpose of hindering and delaying said plaintiffs in execution in the collection of their judgment, and for the purpose of placing his property subject to levy on execution out of his hands, sold and transferred all of said above described property, except the three barrels of whiskey levied upon as aforesaid, by a chattel mortgage, and in other ways to this defendant unknown, and did not at any time between the time of the levy of the execution, to-wit, the 24th day of February, 1890, and the sale of said property under the same, to-wit, the 8th day of March, 1890, point out, or offer to point out, property other than the three barrels of whiskey levied upon as aforesaid on which the defendant could levy execution; that by reason of the premises the said plaintiff elected to choose, and did choose, said property disposed of as aforesaid as exempt in lieu of the three barrels of whiskey held by this defendant." It is also denied that the property described in the petition was mortgaged prior to the date of the levy.

The reply is a general denial of the new matter.

On the trial of the cause a verdict was rendered in favor of the defendant in error for the sum of \$272.90, after which a motion for a new trial was overruled and judgment rendered on the verdict.

The testimony shows that after the levy the debtor filed an inventory of his property with the officer as follows:

"In County Court of Douglas County.

"RILEY & DILLON }  
                  v. }  
L. O. HIBBEN. }

"Inventory of the whole of the personal property owned:

by L. O. Hibben, of Omaha, Douglas county, Nebraska.

3 bbls. of liquor ..... \$270 00  
Necessary wearing apparel.

Saloon and fixtures, and cigars, and stock, consisting of bar, liquors, glassware, and mirror, at No. 220 South 13th street, Omaha..... 2,000 00

“There is a mortgage upon the entire saloon for \$2,442.80, which covers the entire value thereof, given to Isaac Brown.

“STATE OF NEBRASKA, }  
DOUGLAS COUNTY. } ss.

“L. O. Hibben, being first duly sworn, deposes and says that he is a resident of the state of Nebraska, and the head of a family, and that I have neither houses, lands, nor town lots subject to exemption as a homestead under the laws of this state, and that the above inventory contains a true and correct list of all the personal property owned by me.

“(Signed) L. O. HIBBEN.

“Subscribed in my presence and sworn to before me, this 7th day of March, 1890.

“(Signed) WM. SIMERAL,  
Notary Public.

“[SEAL.]  
“Filed March 7, 1889. D. P. FARQUHAR,  
“Constable.”

Thereupon an appraisement was made as follows:

“An inventory and appraisement of the personal property of L. O. Hibben, made this 8th day of March, 1890, by R. M. Patterson, J. E. Van Gilder, and W. C. Van Gilder, three disinterested freeholders, residents of Douglas county, Nebraska, being duly sworn by D. P. Farquhar, constable of said county.

“Assessed value of the property as follows, to-wit :

1 mirror and cupboard.....\$150  
Glassware and silverware ..... 60  
3 bbls. liquor..... 270

## Farquhar v. Hibben.

25 bottles liquor .....	\$25
7 pictures.....	18
2 small mirrors.....	16
1 ice box and contents .....	18
6 demijohns and contents .....	20
6 bottles of wine.....	10
1,200 cigars.....	30
Front bar and working board and attachments .....	65
Hot water urn.....	5
1 stove.....	12
6 cuspidors .....	3
4 chairs .....	2
1 lunch counter and fixtures .....	15
1 gasoline stove, etc.....	5
1 ice box and contents .....	10
Bottles, barrels, etc.....	5

Total valuation .....\$739

“(Signed)

R. M. PATTERSON,  
 “J. E. VAN GILDER,  
 “W. C. VAN GILDER,  
 “Appraisers.”

“STATE OF NEBRASKA, }  
 DOUGLAS COUNTY. } ss.

“I, D. P. Farquhar, constable of said county, do hereby certify that R. M. Patterson, J. E. Van Gilder, and W. C. Van Gilder, three freehold residents of said county were called by me to assess the value of said property, and appraise the same as above.

“Given under my hand this 8th day of March, 1890.

“\_\_\_\_\_,  
 “Constable.”

The testimony tends to show that there was a mortgage upon the saloon fixtures and contents for a large amount, and that this mortgage was executed and filed before the levy of the execution, and, in our view, the jury would be

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 McBrien v. Riley.
 

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warranted in finding that it was made in good faith to secure a valid debt. It is very evident, also, that the debtor had neither lands, town lots, nor houses, and that he was entitled to the benefit of the exemption of \$500 in personal property, to be selected by him in addition to the specific articles exempt.

Technical objections are made to the form of the inventory. It is not a model by any means, but the officer seems to have found and appraised the property, and we must consider the substance more than the form. Taking all the testimony, it is very clear that the property sold by the officer was exempt and that he is liable therefor. There is no material error in the record and the judgment is

AFFIRMED.

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EDWARD MCBRIEN ET AL. V. BEN RILEY ET AL.

FILED JANUARY 2, 1894. No. 5455.

1. A district court is without power to vacate or modify its own judgments subsequent to the term at which they are entered, except for the grounds enumerated in section 602 of the Code.
2. Where an appeal is taken to the district court from a judgment of a justice of the peace, the appellant is not required to give notice of the appeal to his adversary.
3. When a defendant moves to vacate a judgment rendered against him by default, he must accompany his application with an answer setting up a meritorious defense to the action.

ERROR from the district court of Douglas county. Tried below before FERGUSON, J.

The opinion contains a statement of facts.

38	561
44	361
38	561
54	396
38	561
58	477

*Switzler & McIntosh*, for plaintiffs in error :

Judgments regularly entered become final at the end of the term. The court thereafter has no power to vacate the same except upon the grounds enumerated in section 602 of the Code. (Freeman, Judgments [3d ed.], sec. 96; *Carlow v. Aultman*, 28 Neb., 672.)

Upon appeal from a justice court the appellant is not obliged to notify the appellee. (*Rich v. Stretch*, 4 Neb., 186.)

In vacating the judgment entered by default it was necessary for the defendants at the time of their application to present an answer showing a good defense to the action. (*Spencer v. Thistle*, 13 Neb., 227; *Fritz v. Grosnicklaus*, 20 Neb., 413; *Mulhollan v. Scoggin*, 8 Neb., 202; *Hale v. Bender*, 13 Neb., 66.)

The defendants, in their application to have the judgment set aside, made no showing of diligence on their part, and assigned no good reason why they did not plead to the plaintiffs' petition within the time prescribed by statute. Without a satisfactory showing in this behalf, it was error for the court to vacate said judgment. (*Dixon County v. Gantt*, 30 Neb., 885; *Burke v. Pepper*, 29 Neb., 320; *Mulhollan v. Scoggin*, 8 Neb., 202.)

*Mahoney, Minahan & Smyth, contra.*

NORVAL, J.

This is a proceeding in error to review an order made by the court below vacating and setting aside a judgment by default rendered against defendants in error. The action originated before a justice of the peace. From a judgment in favor of defendants plaintiffs appealed to the district court, filing their petition therein on the 8th day of August, 1890. Afterwards, at the September, 1890, term of said court, to-wit, on the 27th day of December, no answer

having been filed, a judgment by default was rendered against defendants for the sum of \$209.20. Subsequently, at the May, 1891, term of said court, and on the 15th day of July, defendants filed a motion to vacate the judgment, alleging the following grounds:

1. Irregularity in obtaining the judgment.
2. That said defendants never had any notice of the application of plaintiffs for a default and judgment in said cause.
3. That plaintiffs (*sic*) have a good defense to the amount of said action.

The motion was supported by the affidavit of the defendant, which stated, in substance, that prior to July 11, 1891, neither of the defendants had any notice said cause had been appealed, or that any proceedings would be, or had been, taken in the district court in said action; that defendants have a good defense to the suit; that John Riley never had any dealings or transactions with plaintiffs; and that Ben Riley is indebted to plaintiffs upon their first cause of action, but denies any liability upon the second cause of action set out in the petition. On the 22d day of July, 1891, the court sustained the motion, vacated the judgment, and gave defendants ten days in which to answer, to which order and ruling plaintiffs took an exception.

It will be noticed that the order vacating the judgment, of which complaint is now made, was entered at a term subsequent to the one at which the judgment was pronounced. This court held in *Carlou v. Aultman*, 28 Neb., 672, that a district court has no power to vacate or modify its own judgments after the term at which they are entered, except for the grounds mentioned in section 602 of the Code; and there can be no doubt of the soundness of the rule there announced. The third ground for setting aside a judgment after the term, enumerated in said section, is "mistake, neglect, or omission of the clerk, or irregularity in

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 Levi v. Fred.
 

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obtaining a judgment." It is obvious that defendants were not entitled to relief under said section. No mistake, neglect, or omission of the clerk of the district court is alleged. There was no irregularity in procuring the judgment. True, the defendants were not notified that plaintiffs had taken an appeal from the judgment of the justice to the district court. The statute does not require that an appellant shall give notice of appeal to his adversary. None was therefore required to confer jurisdiction upon the appellate court. (*State Bank of Nebraska v. Green*, 8 Neb., 297; *Schuyler v. Hanna*, 28 Neb., 601.) There is no statutory provision requiring a plaintiff to give notice of an application for a default and judgment. The defendants were bound to take notice of all proceedings in the case after the appeal was docketed in the district court. Default was not entered until long after the statutory time for filing an answer had elapsed. Defendants being in default of an answer, judgment was properly rendered against them. Again, the defendants failed to accompany their motion to vacate the judgment with an answer. This was necessary. (*Spencer v. Thistle*, 13 Neb., 227.) The order of the district court is

REVERSED.

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### HENRY LEVI ET AL. V. DAVID FRED.

FILED JANUARY 2, 1894. No. 5057.

1. **Appeal: ISSUES IN APPELLATE COURT.** It is a well settled rule in this state that an appeal to the district court must be tried on the same issues as in the court from which the appeal was taken.
2. **Exception to Pleading Raising New Issue on Appeal: WAIVER: REVIEW.** An objection that a petition filed

38	564
40	735
41	698
38	564
45	881
38	564
55	321
38	564
59	348
59	634
38	564
61	698

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Levi v. Fred.

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in the district court introduced a new cause of action will not be considered by this court, where it appears that no objection was made or exception taken on that ground until after the trial in the lower court.

3. **Appeal: PLEADING.** While on appeal to the district court the plaintiff must prosecute the same cause of action as in the court of original jurisdiction, yet, in drafting his petition, he is not confined to the allegations contained in his pleading in the court below, so long as the identity of the original cause of action is preserved.
4. **Failure to Except to Instructions: REVIEW.** Instructions will not be reviewed by this court where no exceptions were taken by the party complaining at the time the charge was read to the jury.

**ERROR** from the district court of Douglas county. Tried below before IRVINE, J.

*Charles Offutt*, for plaintiffs in error:

On appeal to the district court from a lower one, the cause must be tried *de novo*, with the issues precisely the same as at the trial below. (*O'Leary v. Iskey*, 12 Neb., 136; *Baier v. Humpall*, 16 Neb., 127; *Union P. R. Co. v. Ogilvy*, 18 Neb., 638; *Fuller v. Schroeder*, 20 Neb., 631; *Bishop v. Stevens*, 31 Neb., 786.)

*Slabaugh, Lane & Rush*, contra.

NORVAL, J.

This was an action for damages for breach of contract brought by David Fred against Henry Levy and Davis Skolinkowski before a justice of the peace. From a judgment in plaintiff's favor the defendants appealed to the district court, where Fred obtained a judgment against the defendant Skolinkowski.

After the selection of the jury in the district court plaintiff was permitted to file an amended petition, and this ruling of the court is assigned as error. It is insisted by counsel for plaintiffs in error that the amended petition in-

troduced a new and different cause of action from that tried in the justice court. The principle has been frequently stated in the decisions of this court that a party has a right to have the action tried on the same issues as in the court from which the appeal was taken; but this is a right that can be waived. The objection, to be available, must be made at the proper time. The defendants below did not at the time state any ground of objection to the filing of an amended petition, but simply excepted to the ruling being made. It was in the motion for a new trial that complaint was first made that the issues had been changed. A party will not be permitted to wait until he ascertains that the verdict is against him, and then urge that the identity of the issues was not preserved on appeal. Fairness to the trial court, and the opposite party, requires that the objection should be urged at the earliest opportunity. (*O'Leary v. Iskey*, 12 Neb., 136; *Sawyer v. Brown*, 17 Neb., 171.)

The rule which forbids new issues being raised in an appellate court has not been violated in this case. The cause of action set up in the amended petition is the same as declared on before the justice. It is true the facts are more fully stated in the amended petition than in the bill of particulars, but the identity of the cause of action was preserved. This was all that was required. (*Sells v. Haggard*, 21 Neb., 357.)

The original petition failed to state sufficient facts to entitle plaintiff to a judgment against Henry Levi. This defect was covered by proper allegations in the amended pleading. The only person affected by the amendment was Levi, and as the verdict was in his favor, no one was prejudiced by permitting an amendment to be made.

Complaint is made that certain instructions were misleading and prejudicial to the rights of plaintiffs in error. Objections to the charge of the court cannot be considered, for the reason no exceptions were taken by the party now complaining at the time the instructions were read to the

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Howell Lumber Co. v. Campbell.

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jury. The only exceptions in the court below to the charge were taken by defendant in error.

There being no reversible error in the record, the judgment of the court below is

AFFIRMED.

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38	567
55	394

### HOWELL LUMBER COMPANY V. CAMPBELL & DEERSON.

FILED JANUARY 2, 1894. No. 4805.

1. It is the province of the jury to determine the credibility of witnesses and the weight which should be given their testimony.
2. **Credibility of Witnesses: REVIEW.** A jury is not required to decide a disputed proposition of fact merely by a count of witnesses, but should determine which are the most worthy of credit; and, where the evidence is conflicting, a verdict based upon the testimony of the minority of the witnesses will not be disturbed by this court on error or appeal, unless it is manifestly wrong.
3. **Action on an Account: PAYMENT: INSTRUCTIONS.** *Held,* That the instructions fairly submitted to the jury the disputed question of fact in the case.

ERROR from the district court of Sarpy county. Tried below before CLARKSON, J.

*Martin Langdon*, for plaintiff in error.

*C. L. Hover*, contra.

NORVAL, J.

This suit was commenced in the county court by the Howell Lumber Company, a corporation, against Campbell & Deerson, on an account for lumber sold and delivered. From a verdict and judgment in favor of defendants

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Howell Lumber Co. v. Campbell.

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plaintiff appealed to the district court, where the defendants again obtained a verdict, and judgment was rendered thereon.

It is undisputed that on and prior to December 30, 1888, defendants were indebted to plaintiff in the sum of \$647.82, for lumber purchased by the former of the latter. The defense in the court below, as well as here, was that the account had been settled by the defendants turning over to plaintiff farmers' notes aggregating the sum of \$650.06. Plaintiff admits receiving notes from defendants to said amount, but insists they were accepted merely as collateral security for the defendants' indebtedness, and not in payment thereof. The testimony introduced upon the trial on behalf of plaintiff is to the effect that on the 30th day of December, 1888, James E. Campbell, one of the firm of Campbell & Deerson, for the purpose of securing an extension of the time of payment of the indebtedness, entered into an arrangement with Herbert N. Jewett, manager of the Howell Lumber Company, by which the defendants were to deliver to plaintiff, as collateral security, notes to the amount of \$1,000; that the notes subsequently turned over by Campbell were received under said contract, and that all sums collected on said notes have been placed to the credit of the defendants, reducing their indebtedness to the plaintiff to the sum of \$415.97. The defendant Campbell, while upon the witness stand, denied *in toto* making any such arrangement, but on the other hand testified, positively and unequivocally, that the understanding between him and Jewett was that he should pay the account with farmers' paper, and in pursuance of such arrangement, and as soon as he procured the notes, they were delivered to the Howell Lumber Company, he taking receipts therefor. All of the receipts except one were in form like this:

"Received of Campbell & Deerson, one hundred six and  $\frac{96}{100}$  dollars, in notes, as follows, to-wit: \* \* \*

"(Signed)

B. F. THOMAS."

One of the receipts specified that the note therein described was received as security on account. The notes were indorsed by Campbell & Deerson, either "Protest and notice waived," or "Protest waived." The evidence would have justified the jury in returning a verdict for either party, depending upon which set of witnesses was believed. The conflicting testimony has been submitted to two different juries, and each time the verdict was for defendants. Under the circumstances we do not feel warranted in disturbing the verdict as being against the evidence, although the greater number of witnesses sustain the position of the plaintiff, and notwithstanding we might not have decided as did the jury had we been sitting in their places. Plaintiff is not without remedy. It has recourse against defendants by action upon their indorsements upon the notes.

Complaint is made of certain instructions to the jury, given at the request of defendants, numbers 1 and 2 of which being as follows:

"1. You are instructed that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly.

"2. You are instructed that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proven in the case."

The foregoing are above criticism. They not only state the rule correctly, but are applicable to the testimony. The credibility of the witnesses was alone for the jury to determine, and the above instructions did not authorize the triers of fact to go outside of the record, as counsel for plaintiff contends, to determine which witness should be believed and which disbelieved. The witnesses on one side had testified to a state of facts entirely opposite to that related by those on the other side, and it is obvious that the jury could not, if they reached a conclusion at all, give all the witnesses equal credit. A greater number of persons had testified on the trial on behalf of one party than did on the other, and, in view of this fact, it was not improper to charge the jury as to the rules for determining the weight to be given conflicting evidence. The jury was not obliged to decide the case by a count of witnesses. Defendants' request stated the rule as to their liability upon their indorsements on the notes. It certainly could not have misled or confused the jury, especially when considered in connection with the fourth request to charge, which was given, and which reads as follows:

"4. You are instructed that if you find from the evidence that the defendants delivered to the plaintiff, or its agents, promissory notes in the sum of six hundred fifty and  $\frac{96}{100}$  dollars, indorsed 'protest waived,' and the plaintiff, or its agents, accepted the same in payment of the claim which the plaintiff had against the defendants, then your verdict should be for the defendants."

The issue in the case was whether or not the notes were accepted and received in payment of plaintiff's demand, and the charge fairly submitted that question to the jury. By an instruction given by the court on its own motion the jury were told, in effect, that if the notes were given and received as collateral security, the plaintiff was entitled to a verdict. Plaintiff has no just ground for complaint of the charge. The judgment is

**AFFIRMED.**

JOHN H. HARTE, RECEIVER, APPELLEE, V. ABRAM CASTETTER ET AL., APPELLEES, IMPLEADED WITH CHARLES A. HARVEY, APPELLANT.

FILED JANUARY 2, 1894. No. 6166.

1. **Motion to Dismiss Appeal: NOTICE.** A motion filed in this court to dismiss an appeal, on the ground that the appellant has drawn from the clerk of the district court the money awarded him by the decree sought to be reviewed, will be heard, notwithstanding notice of said motion was not served on the opposite party until after the expiration of the time prescribed by the rules of this court for serving briefs in the case, when it appears appellee had no notice or knowledge of the facts upon which the motion was based before the briefs were due.
2. ———. Rule 8 *held* not to apply to such a motion.
3. **Acceptance by Appellant of Benefits of Decree: DISMISSAL OF APPEAL.** A party who, after appealing from a decree in his favor, voluntarily accepts the benefits, or receives the advantage, of the decree is thereby precluded from afterwards prosecuting his appeal.

MOTION to dismiss appeal from a decree of the district court of Washington county, and motion to strike the motion to dismiss from the files. Heard below before SCOTT, J. *Appeal dismissed.*

*Switzler & McIntosh*, for appellant.

*De France & Richardson, E. Wakeley, B. G. Burbank, Charles Offutt, L. W. Osborn, W. E. David, W. C. Walton, J. W. West, John O. Yeiser, and Jesse T. Davis*, for appellees.

NORVAL, J.

On September 30, 1893, appellees filed in this court a motion to dismiss the appeal, on the ground that after the rendition of the decree sought to be reviewed the appellant

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Harte v. Castetter.

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Charles A. Harvey received and accepted the benefits of said decree. Subsequently appellant filed a motion to strike from the files the motion to dismiss the appeal, alleging that said motion was not filed in this court until Saturday, the 30th day of September, 1893, and that notice of said motion was not served in time, either upon the appellant or his attorneys.

The cause was submitted upon the motions. We will first pass upon appellant's motion to strike.

It is insisted that the motion to dismiss the appeal comes too late, inasmuch as the same was not filed, nor was notice thereof served upon either the appellant, or his attorney, until after the time fixed by rule 9 of this court, for serving briefs in said cause, had expired. Appellant relies upon rule 8, which declares that "neither motions to dismiss, unless for the want of prosecution, nor to strike a bill of exceptions, will be heard, unless notice thereof shall be served upon the opposite party, or his attorney, or the attorney who tried the cause for him in the trial court, at or before the expiration of the time for serving briefs in the case." While the language just quoted will justify the construction placed thereon by appellant, namely, that no motion to dismiss a cause out of this court, except for want of prosecution, will be entertained, where notice of such motion is not served prior to the expiration of the time specified in rule 9 for serving briefs, it was never contemplated that the rule should be held applicable to motions to dismiss, like the one in this case, based upon matters *dehors* the record, but rather to motions to dismiss, framed to take advantage of mere errors, defects, and irregularities, not affecting the jurisdiction of the court, appearing upon the face of the record itself. To hold that the rule applies to every motion to dismiss, except for failure to prosecute the cause, would preclude this court from hearing a motion to dismiss a petition in error or appeal where the transcript of the judgment sought to be reviewed

is not filed in this court within the time prescribed by statute, unless notice of the motion has been served before the expiration of the period for serving briefs; yet this court has frequently dismissed proceedings in error and appeals because not taken in time, although the motion therefor was not made until after the service of the brief of the plaintiff in error or appellant. Suppose, after an appeal is perfected in this court and the briefs on both sides are prepared and served, the appellant accepts the benefits of the decree, or the parties settle the controversy. Would not the court, on the motion, and against the will of the other party, dismiss the appeal for that reason, notwithstanding the provisions of the rule of this court under consideration? To suggest the question is to evoke an affirmative answer. This court will not knowingly sit to hear a cause where it satisfactorily appears that the subject-matter of the suit has been settled, or where the party seeking a reversal of a judgment has accepted the money awarded him by the trial court. The case at bar, in principle, does not differ from the supposed case. Here the ground of the motion to dismiss is that appellant has received the amount found due him under the decree. It appears that neither the appellees nor their attorneys had any actual notice or knowledge that the money had been drawn by appellant until after the convening of the last term of this court, and after the time for serving briefs had elapsed. The fact that the receipt of the attorneys for appellant for the money was filed with the clerk of the district court long after the rendition of the decree does not amount to actual notice. Appellees were not bound to examine the records and files of the lower court to ascertain whether the money had been received by appellant. Appellees were diligent in filing their motion to dismiss after the discovery of the fact upon which the same is based. Appellant's motion to strike must be overruled.

As to the motion to dismiss, it may be stated as a gen-

eral rule that a party who accepts the benefit of a decree waives the right to prosecute an appeal from it. This principle has been declared and enforced by this court in the following cases: *Hamilton County v. Bailey*, 12 Neb., 56; *Gray v. Smith*, 17 Neb., 682; *Saxon v. Cain*, 19 Neb., 488, 492. The same doctrine has been asserted too frequently by other courts to be longer questioned. (*Babbitt v. Corby*, 13 Kan., 612; *Rasure v. McGrath*, 23 Kan., 597; *Babcock v. Banning*, 3 Gil. [Minn.], 123; *Mississippi & M. R. Co. v. Byington*, 14 Ia., 572; *Borgalthous v. Farmers & Merchants Ins. Co.*, 36 Ia., 250; *School District of Altoona v. District Township of Delaware*, 44 Ia., 201; *Cogswell v. Colley*, 22 Wis., 399; *Flanders v. Merrimac*, 44 Wis., 621; *Smith v. Coleman*, 46 N. W. Rep. [Wis.], 664; *Newman v. Kizer*, 26 N. E. Rep. [Ind.], 1006; *Glackin v. Zeller*, 52 Barb. [N. Y.], 147; *Bennett v. Van Syckel*, 18 N. Y., 481; *Knapp v. Brown*, 45 N. Y., 207; *Murphy v. Spaulding*, 46 N. Y., 556; *People v. Mills*, 109 N. Y., 69; *Murphy v. United States*, 104 U. S., 464; *Neal v. Field*, 68 Ga., 534; *Cassell v. Fagin*, 11 Mo., 208; *Smith v. Jack*, 2 Watts & S. [Pa.], 103; *Laughlin v. Peebles*, 1 Pen. & W. [Pa.], 114; *Hall v. Lacy*, 37 Pa. St., 366; *Gibson v. Hale*, 57 Tex., 405.)

It would be manifestly unjust to permit a party who has accepted the fruits of a decree, by taking all the money the decree gives him, to prosecute his appeal. A party who is dissatisfied with a decree in his favor should have the same reviewed by proper proceedings. He has the option to do that, or to proceed to enforce the decree and receive the benefits therefrom; but he cannot pursue both, since one course is inconsistent with the other. The acceptance of the money found due by a decree must be deemed an abandonment of an appeal previously taken. This view is fully sustained by the foregoing authorities.

Does this case fall within the rule above stated? The record shows that on the 5th day of December, 1892, a decree was rendered in this cause in the district court of

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Harte v. Castetter.

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Washington county, distributing certain moneys in controversy among the numerous parties to the action. A portion of said fund was awarded to Charles A. Harvey, one of the defendants therein, and the remainder was distributed between the other parties. Harvey being dissatisfied with the sum given him by the decree, appealed the cause. All of the parties, unless it be Harvey, have drawn from the clerk of the district court the full amounts due them under the decree. On the 30th day of December, 1892, Messrs. Switzler & McIntosh, attorneys for appellant, sent to the clerk of the district court a letter, a copy of which is as follows:

"WARREN SWITZLER.

JAMES H. MCINTOSH.

"SWITZLER & MCINTOSH, ATTORNEYS AT LAW,

"NEW YORK LIFE INSURANCE BUILDING,

"OMAHA, NEB., Dec. 30, 1892.

"*Clerk District Court Washington County, Blair, Nebraska.*—DEAR SIR: Kindly send us check for any moneys in your hands as clerk of the county available for payment to our client, Charles A. Harvey, in his claim against Washington county, In re Richards & Company in litigation in Harte, receiver, etc., v. Castetter et al., and this letter, together with your canceled check, will be your receipt for the same, and greatly oblige,

"Yours truly, SWITZLER & MCINTOSH."

In compliance with said letter the clerk of the district court sent to Messrs. Switzler & McIntosh on December 31, 1892, his check on the Blair State Bank, payable to their order, for \$850.84, which was received by appellant's attorneys, and they received the money thereon. Counsel for appellant insist that they did not receive or accept any money under the decree. The money in litigation had been paid to the district clerk prior to the trial in the court below to abide the decision of the court. On the trial a portion of the fund was found due, and decreed appellant.

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In view of these facts, the only construction that we can place upon the letter above alluded to, and the receiving of the money on the check, is that the \$850.84 was drawn in pursuance of the terms of the decree. Moreover, the clerk of the district court testifies that the money was so paid, and there is not a scintilla of testimony to the contrary.

But it is said that appellant did not receive, and was not sent, the full amount allowed him by the decree. The only evidence offered on this point is that given by the clerk of the district court, who, in his testimony, states that: "I mailed a check to said attorneys (Switzler & McIntosh) in compliance with their request, for \$850.84, the amount due Harvey under said decree." From the foregoing it would seem that appellant has been paid all he was entitled to by the decree, but whether he has or has not, in our view, is quite immaterial. The doctrine that a party who accepts the benefit of a decree in his favor waives the right to prosecute an appeal, is not limited in its application to those alone who have accepted the full amount awarded, but applies as well where there has been part acceptance. A party, by voluntarily accepting under a decree a portion of the amount found due him, thereby as fully and completely recognizes the validity of the decree as if he had drawn the full amount allowed him. If appellant desired to prosecute his appeal, he should not have accepted any portion of the fund paid into court, which was adjudged to be his. He was not compelled to accept the money, but could have allowed it to remain with the clerk of the district court until his appeal was decided. The acceptance of the money, under the circumstances disclosed by this record, precludes appellant from challenging the correctness or validity of the decree. The appeal therefore must be

DISMISSED.

**PATRICK EGAN v. THOMAS BONACUM, BISHOP.**

FILED JANUARY 2, 1894. No. 5048.

**Action Upon Subscription Contract: PARTY PLAINTIFF.**

A subscription contract having provided that each subscriber thereto became bound to pay such sum as should be placed opposite his name, to enable a designated committee to erect one building and repair another, both buildings being sufficiently designated, *held*, that suit was properly brought for the collection of such subscription in the name of the official or dignitary in whom was vested the title of the real property proposed to be improved, as plaintiff; the title being held, and the suit being brought, for the use of an unincorporated association and its individual members, too numerous to be named, as beneficiaries.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

The facts are stated in the opinion.

*Pound & Burr*, for plaintiff in error:

A member of a voluntary unincorporated association cannot maintain an action in his own name upon a contract made with the association. (*McMahon v. Rauhr*, 47 N. Y., 67; *Habicht v. Pemberton*, 4 Sandf. [N. Y.], 657; *Austin v. Searing*, 16 N. Y., 112; *Wilkins v. Wardens*, 52 Ga., 351; 1 Bates, Pleadings, Parties & Forms, p. 40; *Lloyd v. Loaring*, 6 Ves. [Eng.], 773.)

The bishop and others of a committee as members of the church were made the trustees of an express trust as to the subscription fund, and they should have brought the action. (*Slocum v. Barry*, 34 How. Pr. [N. Y.], 320; *Hutchins v. Smith*, 46 Barb. [N. Y.], 235.) •

*Charles E. Magoon, contra.*

RYAN, C.

This action was brought for the recovery of the full amount pledged by Patrick Egan by his subscription to a written instrument signed by himself and seventy-three other persons, promising to pay such amount as was placed opposite the name of each signer. Opposite the subscription of Mr. Egan were placed the character and figures "\$500." This written instrument, omitting the several signatures and amount opposite each, was in the following language:

"LINCOLN, NEBRASKA, February 28, 1888.

"Whereas the Rt. Rev. Thomas Bonacum, Rev. M. A. Kennedy, John Fitzgerald, William McLaughlin, Patrick Egan, Thomas Heelan, James Daley, James Kelley, F. S. Potvin, James Ledwith, P. W. O'Connor, J. J. Butler, John P. Sutton, A. Halter, and Charles McClave have been appointed a building committee of St. Theresa's church, in the city of Lincoln and state of Nebraska; and whereas, it is the intention of said building committee to enlarge the said St. Theresa's church and to erect a parochial school building in the city of Lincoln and state of Nebraska:

"Now, therefore, we the undersigned, do hereby promise and bind ourselves individually to pay the sum of money placed opposite our individual names, to enable the said committee to carry out their said intentions in reference to the aforementioned church and school, which sum of money is to be paid in installments as follows: One-fifth on demand; one-fifth on the 1st of May; one-fifth on the 1st of July; one-fifth on the 1st of October, and one-fifth on or before the 1st of January, 1889."

Upon a trial without the intervention of a jury the district court of Lancaster county rendered judgment against Mr. Egan, the plaintiff in error, for the full amount of his subscription with interest. The only question pre-

sented by the record is whether or not the action could be maintained by the plaintiff in the trial court in the form, and for the reasons indicated by the title of the case as in the petition set forth. This title was as follows: "Thomas Bonacum, Bishop of the Roman Catholic church for the Lincoln Diocese, who sues for himself and the St. Theresa's Catholic Church, of Lincoln, Nebraska, a religious association unincorporated, and the members of said religious association, who are too numerous to be brought before the court, plaintiff, v. Patrick Egan, defendant." It is observable that the subscription paper heretofore referred to did not designate a payee. It merely indicated the purposes to which, when collected, the several amounts should be applied by the committee referred to, which purpose was the repairing of one building and the erection of another. It was fully alleged in the petition, and fairly shown by the proofs upon the trial, that the title of all real property of the kind upon which the designated improvements were to be made was held by the bishop of the diocese in which such property was situated; was held for the unincorporated association heretofore mentioned; that Thomas Bonacum, at the time of the trial and for the whole time covered by the transactions therein involved, was, and had been, such bishop; that the improvements contemplated in the subscription contract had been fully completed at a cost, as shown by competent evidence, of \$44,000; and that the plaintiff in error had refused to make any payment whatever upon his said subscription. There was not only a proper plaintiff in the action, but there was sufficient proof as well, to sustain the judgment, which is therefore

AFFIRMED.

## WARD S. MILLS V. GEORGE LEAVITT.

FILED JANUARY 2, 1894. No. 5437.

**Real Estate Agents: REVIEW OF JUDGMENT FOR COMMISSION.**

In an action by a real estate agent to recover a commission alleged to have been earned by himself in procuring a satisfactory purchaser of the real property of the defendant, the sole matter in controversy having been whether payment was essentially conditioned upon the happening of a subsequent event, the verdict of a jury upon that point, being supported by competent evidence under proper instructions of the court in respect to the matters in controversy, will not be disturbed.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Mockett, Rainbolt & Polk*, for plaintiff in error.

*Leese & Stewart*, contra.

RYAN, C.

This suit was brought by George Leavitt, a real estate agent of Lincoln, Nebraska, against Ward S. Mills, by whom Leavitt alleged he was employed as such agent to sell certain lots owned by Mills, on terms specified; and Leavitt having, as he averred, fully complied with all prerequisites necessary thereto, was, as he alleged, entitled to recover \$180 as fair compensation, and interest thereon, for his said services. There seems to be no contention made by plaintiff in error, except as to whether or not an essential part of the contract was that Leavitt was to receive no payment unless sufficient was paid by the purchaser to serve that purpose. Upon this point the court instructed the jury as follows:

"If you believe from the evidence that the defendant agreed to pay said commission upon getting a loan on the

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Dunn v. Dietz.

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several houses and lots, and if you find from the evidence that said loans were obtained, then your verdict should be for the plaintiff for \$180, with interest at seven per cent per annum from date said loans were obtained to February 1, 1892, the first day of this term of court.

“If you believe from the evidence that by agreement of the parties to this action the said commissions were not to be paid by defendant until he had obtained from the purchaser, Algur, the first payments to be made by said purchaser on said lots, and if you find from the evidence that such first payments have not yet been made, then your verdict should be for defendant.”

If the verdict had been for the defendant, it is at least doubtful whether or not the first paragraph above quoted would have vitiated it, for plaintiff's right of recovery was thereby governed by considerations much narrower than were proper under the evidence. Whatever criticism might justly be made upon that paragraph is not material, for in any event only the defendant in error could complain. The second paragraph quoted very fairly stated the law as applicable to the defense made in the answer, and had the support of sufficient evidence to render it proper to be given. The verdict of the jury thereon was fully justified and the judgment of the district court is therefore

AFFIRMED.

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FRANK L. DUNN V. CHARLES N. DIETZ.

FILED JANUARY 2, 1894. No 5027.

38	581
61	677

**Review:** THE ONLY ASSIGNMENT OF ERROR in this case being that the trial judge was wrong in a certain conclusion of fact, the evidence examined, and *held* to support the court's finding, and its decree affirmed.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Adams & Scott*, for plaintiff in error.

*Talbot & Bryan* and *T. S. Allen*, contra.

RAGAN, C.

Charles N. Dietz brought suit in the district court of Lancaster county against Wilmer Mayes, Frank L. Dunn and others, to foreclose a lien for material furnished to build a house on lot 9, block 3, Sherwin's addition to the city of Lincoln. The lien of Dietz was filed on the 15th day of August, 1888. Dunn held a mortgage against the same property executed to him by the owner, Mayes, and filed in the office of the register of deeds on the 31st day of May, 1889. Dunn defended against the lien of Dietz on the ground that the material mentioned in the lien in suit did not go into the house built on lot 9, but went into a house built by Mayes on lot 1, block 2, Sherwin's addition, and that his, Dunn's, mortgage was a first lien on lot 9, block 3. Mayes made no defense. The court found that the material mentioned in the lien entered into the construction of the house on lot 9, block 3, and that Dietz had a first lien on the property. From this finding and decree Dunn prosecutes error. His counsel say: "We insist that in this case there was no evidence showing that the lumber mentioned in the mechanic's lien, or any part of it, ever went into the building on lot 9, block 3, but that the testimony all shows that the material went into lot 1, block 2."

We have carefully read all the evidence and cannot agree that there is no evidence to support the court's finding. We think it is supported by competent evidence, and therefore we cannot disturb it. There is no question of law involved in the case, and the decree of the district court is

AFFIRMED.

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Damon v. City of Omaha.

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SAMUEL G. DAMON, APPELLEE, v. CITY OF OMAHA ET  
AL., APPELLANTS.

38	583
42	660
43	67
43	617

FILED JANUARY 2, 1894. No. 3492.

**Review:** NO BRIEFS HAVING BEEN FILED by either party, and the judgment conforming to the pleadings and evidence, it is therefore affirmed. *Phenix Ins. Co. v. Reams*, 37 Neb., 423, followed.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*John L. Webster, A. J. Poppleton, and W. J. Connell,*  
for appellants.

*Charles B. Keller, contra.*

IRVINE, C.

This was an appeal from a decree of the district court of Douglas county perpetually enjoining the defendants from working a street in that city to a grade alleged in the petition not to have been legally established, facts being alleged from which it would follow that plaintiff's property abutting upon the street would be seriously injured, and it also being alleged that no lawful assessment or tender of damages had been made to plaintiff, and that no petition had been made for a change of grade.

No briefs have been filed on behalf of either party. We have examined the pleadings and the evidence; and as they are sufficient to support the judgment, it is accordingly

**AFFIRMED.**

## STATE OF NEBRASKA V. GEORGE H. HASTINGS ET AL.

FILED JANUARY 3, 1894. No. 6090.

MOTION for rehearing of case reported in 37 Neb., 96. The motion was referred to the supreme court commissioners, and, upon their recommendation, was overruled. MAXWELL, C. J., dissented from the order overruling the motion, and filed the opinion following:

MAXWELL, C. J.

In my view the motion for a rehearing should be sustained. A careful examination of the majority opinion as reported in 37 Neb., 96, 55 N. W. Rep., 778, shows that the majority of the court really sustained the principal charges against the defendants. Thus it is said: "At the time of the appointment of Dorgan to superintend the construction of the cell house he was the agent and manager of Mosher, the lessee of the penitentiary, and charged with the duty of subleasing the prison labor. In view of that fact his selection by the board as the representative of the state, knowing, as will hereafter appear, that it would be obliged to depend upon Mosher for labor to carry on the work, is highly censurable, and should, to say the least, be characterized as unbusinesslike, and utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances." Could there be a more serious charge against public officers than that they "were utterly wanting in that intelligent regard for the interests of the state which the law demands of public officers under like circumstances"? We must remember that the man appointed by the board, against whom this language is used, is W. H. Dorgan, at the time the overseer and manager of Mosher in the penitentiary. This man, on mere estimates and in violation of the duty of

the board, was permitted by them to draw more than \$32,000 out of the treasury by their approval of his estimates and accounts, while the whole amount of labor and material furnished by him did not exceed, if performed by citizen labor, more than \$13,260, and probably did not cost more than \$8,000. There was no money in the treasury, so that the warrants have presumably been drawing interest at seven per cent. It is true that Dorgan afterwards paid to Hopkins about \$6,000, but he still retains in his hands in the neighborhood of \$15,000, with two years' interest thereon. If there has been any attempt on the part of the board to recover this money we are not advised as to the fact. The truth appears to be that this money was either loaned or practically donated to Mr. Dorgan, and this occurred by the want of intelligent regard for the interests of the state, which the majority of the court find to be the fact in the appointment of Dorgan.

David Butler, the first governor of this state, was impeached and removed from office because he had appropriated about the same amount of money as Dorgan has in this case. Butler, however, offered to secure the state, and afterwards did secure it, and finally the debt was paid. Notwithstanding this fact, the proposed security, he was removed from office because his appropriation of the money was in fact embezzlement, which it was the duty of the house of representatives and senate to condemn; otherwise, the state would be liable to be plundered by its own officers. It was contended then, as now, that the offense did not justify impeachment; that that was a heroic remedy to be applied only in extreme cases; but after full argument, and a careful investigation of the law, the senate, which contained a number of capable lawyers, held the act proved was sufficient cause for impeachment and removal from office; and no intelligent lawyer at the present time will question the conclusion reached in that case.

In the case at bar the state, through these defendants,

has been deprived of this money; and it either directly or indirectly forms a part of the debt of the state to the school fund on which it is paying interest. So in regard to the other principal charges, they are admitted to be true, but the offenses are condoned. It is claimed that they do not justify impeachment. The object of impeachment in this state is to secure the removal of the delinquent officers. The findings in this case are practically a verdict of guilty. It is unnecessary to set them aside, but simply to vacate the conclusions of law. Will any one contend that the acts complained of are not misdemeanors? They were acts in disregard of their duty, by which the state was defrauded. Suppose the officers spoken of were county commissioners and let contracts and allowed claims against the county as these respondents have done. Would they not be subject to removal from office? No court would hesitate for a moment to direct such removal. Yet removal of a county officer from office for these offenses is but another form of impeachment. It may be said that a state officer will not be impeached for as small an offense as a county officer. Why not? Both take substantially the same oath, and the law requires the same duties of both, viz., that they shall perform the same faithfully and to the best of their ability. It would seem if any discrimination is to be made it should be to require more strictness of the state officers than the officers of a county. This much is certain: if these men are justified for these acts, or they are held to constitute no ground of offense, it will be a direct invitation to other state officers to repeat these and similar acts, and will injuriously affect every department of business. The government of a state is a great business institution, and should be conducted on business principles, the same as a well managed mercantile establishment. If it is not, if money can be stolen with impunity and appropriated by the parties, I fear that it will be difficult to persuade the employe of any other establishment that what is not pun-

ishable in a state official is punishable if committed in a private establishment. There can be but one standard for the carrying on of business, whether it is carried on in the state house or private establishment, and that is equal and exact justice to all.

38 587  
38 591

D. H. NOLL V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 5159.

**A second forfeiture of a recognizance, incurred because the principal a second time failed to appear according to the condition of his obligation, will not be vacated and canceled on the return of the principal after such forfeiture, where sufficient excuse is not shown for his failure to appear before the forfeiture taken, and the record shows that the prosecution has been deprived of proofs by the delay. Rule applied.**

**ERROR to the district court for Gage county. Tried below before BROADY, J.**

*A. D. McCandless*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

**NORVAL, J.**

This is a proceeding to review the decision of the district court in refusing to vacate and set aside the forfeiture of a recognizance. The facts in brief are: That at the February term, 1890, of the district court of Gage county the grand jury presented an indictment against plaintiff in error charging him in each of the several counts thereof with selling intoxicating liquors without a license. Notwithstanding he had given bond for his appearance at and during said term of court, he left the state and did not re-

turn until after the trial jury had been excused. While thus absent his bond was forfeited by the court; but subsequently, upon his motion, and a very weak showing, the forfeiture was vacated and the cause reinstated upon the docket. At the September term, 1890, of the court, the cause was tried, but the jury being unable to agree upon a verdict, they were, with consent of the defendant, discharged without verdict, and the defendant entered into recognizance for his appearance at the March term, 1891, of said court. When the criminal docket for said term was called, said cause was set for trial by the court on Monday, March 16th, on which day the accused and his witnesses were in attendance upon the court, but the cause was not on that day reached, owing to the fact that another state case was then on trial. The county attorney, Mr. Dobbs, however, personally notified the defendant on March 16th that his cause would be pushed for trial on the following day. On the morning of the 17th day of March the defendant being present in the court room, was informed by the prosecutor, in the presence and hearing of the court, that his said cause would be called for trial immediately after the convening of the court at 1:30 o'clock P. M. of said day; and the cause was thereupon, in defendant's presence and hearing, set for trial at that time. There was a breach of the condition of defendant's recognizance by his failure to appear when his case was called on the afternoon of the last named date; and his recognizance was then declared forfeited by the court, which was duly entered of record; and thereupon the witnesses for the state were excused, and left the court room. On April 3d a motion was filed by defendant to set aside the default, which, at a subsequent term of court, was overruled, and an exception taken to the decision.

The primary object in requiring a defendant in a criminal case to give bail is to save the county the expense of keeping him in jail until trial, as well as to insure his per-

sonal attendance to answer the charge against him, and to abide the judgment of the court relating thereto. Our statute, section 384 of the Criminal Code, provides that "when any person under recognizance in any criminal prosecution, either to appear and answer, or testify in any court, shall fail to perform the conditions of such recognizance, his default shall be recorded, and the recognizance forfeited in open court." The forfeiture of the recognizance in this case was strictly within the provision just quoted. The power of a court to vacate the forfeiture of a recognizance, which has been declared by said court, is not questioned in this case, and there can be no doubt of it. A district court has ample power to discharge the forfeiture of a recognizance in a criminal case upon a sufficient showing, to the same extent that it can set aside the default of a party in a civil action; and in neither case will the ruling be disturbed by a reviewing court, unless it appears that there has been an abuse of discretion. We are unable to discover any error in the overruling of the motion to set aside the forfeiture. The defendant had the second time failed to appear when the case was reached for trial, and his recognizance was forfeited the second time. The only excuse he offers for his absence the last time is that when he left the court room before noon there was a criminal cause being tried, and he was told that said cause would take all the afternoon. He fails to tell who so informed him. Certain it was that neither the county attorney nor the court so informed him, for it is uncontradicted that the former, in presence of the court, notified the defendant that his case would be called for trial on the convening of court that afternoon. It was his duty to be present at that time. The state was ready with its witnesses to proceed with the trial, but upon the forfeiture of the recognizance the state witnesses were discharged; and the record shows that at the time of the ruling on the motion to vacate and cancel the forfeiture said witnesses were scattered, many

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Rawlings v. State.

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of them being out of the state and their whereabouts unknown. There is another significant fact, and that is the defendant, although he knew of the taking of the forfeiture a few minutes afterwards, did not complain of the action of the court, or apply to have his default set aside, until after the trial jury for that term of court had been discharged. He was aware that the case could not be tried before the next term. This delay in asking for relief, unexplained as it is, is suggestive that in absenting himself he did so for the purpose at least of putting the case over the term. Had the defendant been more prompt in seeking relief, and had he not been once before in default, he would appear in a more favorable attitude before the court. Plaintiff in error violated the conditions of his recognizance, and no valid excuse being given for his failure to appear before the forfeiture was taken, the decision of the district court is

AFFIRMED.

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M. L. RAWLINGS V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 5158.

A forfeiture of a recognizance will be vacated and canceled on the payment of costs, where, after the default and on the same day, the principal voluntarily appears in court, in case sufficient cause is shown for his failure to appear according to the obligation of his recognizance.

ERROR to the district court for Gage county. Tried below before BROADY, J.

*A. D. McCandless*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

NORVAL, J.

The facts in this case are substantially the same as in the case of *Noll v. State*, 38 Neb., 587, except in the following particulars: The absence of plaintiff in error from the court room on March 17th, 1891, was the only time he failed to be in attendance when wanted, and the forfeiture of his recognizance on that day was the only one ever taken against him; that the case against Noll was first upon the docket and was set down for trial first on said March 17th; that Rawlings was in attendance upon court with his witnesses during the day previous, and when court adjourned that evening he was informed by his attorney that his case would not be reached until afternoon of the next day, if that soon, and plaintiff in error returned to his home in Wymore, where he remained during the forenoon of March 17th, and went to Beatrice on the afternoon train for the purpose of having his case tried, arriving at 2:30 o'clock, when, owing to the failure of Noll to appear, he found that his case had been called sooner than was expected, and his recognizance forfeited; that he would have been promptly on hand if he had not believed that the Noll case would be tried before his case would be reached. Plaintiff in error filed a motion in the district court to have the forfeiture of his recognizance vacated, and supported the same by his own affidavit and the affidavit of Mr. McCandless, his attorney. The motion was overruled.

The testimony in the record convinces us that plaintiff in error acted in the utmost good faith. There is no claim that he was aware, or had any intimation, that Noll would fail to appear. He was justified in supposing that the case against Noll would be tried; and had it been, plaintiff in error would have been in court in ample time to have heard his own case called, and prevented a forfeiture of his recognizance. There are not presented facts showing such gross laches on the part of plaintiff in error as will pre-

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clude him from having the forfeiture vacated; but the relief should be granted conditional upon his payment of costs, since it appears that Gage county has incurred considerable expense in procuring attendance of witnesses for the state, and said witnesses having scattered, it is not certain that their testimony can be procured. In case plaintiff in error shall pay to the clerk of the district court within thirty days all the costs in the criminal case in which forfeiture of his recognizance was taken, and file with the clerk of this court the receipt of such payment, the order of the district court will be reversed and the forfeiture vacated and canceled. In the event all of said costs are not paid within the time stated, the order of the court below, overruling the motion to set aside said forfeiture, will be affirmed.

JUDGMENT ACCORDINGLY.

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CHARLES VANDEVENTER V. STATE OF NEBRASKA.

FILED JANUARY 3, 1894. No. 6304.

**Criminal Law: REASONABLE DOUBT: INSTRUCTIONS.** The rule which requires proof in criminal cases, such as will exclude all reasonable doubt of the guilt of the accused, in order to authorize a conviction, is not limited to prosecutions for felonies, but applies as well to misdemeanors.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

*Beeson & Root*, for plaintiff in error.

*George H. Hastings*, Attorney General, for the state.

POST, J.

This is a petition in error from the district court of Cass county. From the transcript it appears that the

plaintiff in error was tried upon an information charging him with maliciously shooting with intent to wound the complaining witness, one Stull. A trial resulted in a verdict of not guilty of the offense charged, but guilty of an assault and battery. A motion for a new trial having been overruled, judgment was entered on the verdict, to which exception was taken, and which presents the questions to be determined by this court. The facts disclosed by the record are substantially as follows: Stull, the complaining witness, and the plaintiff in error were neighbors occupying adjoining farms. On the land of the former was a quantity of old lumber, the remnant of a packing house formerly operated there, to which each claimed title by purchase. Steps had been taken by the county board to establish a public road through the land of Stull, the lumber above mentioned being within the proposed right of way thereof, but at the time of the shooting charged said road had not been opened for the use of the public, and the fences of Stull had not been removed therefrom. On Sunday, the 26th day of June, 1892, the plaintiff in error opened the wire fence and went upon the premises of Stull with his team to secure a load of the lumber in controversy. When the latter discovered him in the act of loading the lumber, he closed the fence, and commanded him to unload the lumber then on the wagon. Plaintiff in error was armed with a revolver and an axe, while Stull was unarmed, although during the altercation which ensued he procured a willow club, but for what purpose does not clearly appear. It is shown, and is not disputed, that the plaintiff in error shot twice at Stull, one shot taking effect in the arm of the latter, and the other causing a slight wound in his hip. The contention of the plaintiff in error was that he had retreated before Stull, who was endeavoring to strike him with the club above mentioned, until farther retreat became impossible by reason of a steep bank, when he fired the shots in question in defense of his own person. It is

necessary to notice but one of the questions argued by counsel, viz., that presented by the following instructions given by the court on its own motion :

“5½. Should the jury find from the evidence that there is a reasonable doubt of the accused’s guilt as he stands charged in the information, still, if they believe from the evidence that the defendant is guilty of an assault and battery, you may return a verdict of not guilty of the offense charged in the information, but that the defendant is guilty of assault and battery.

“6. The defendant is entitled to every presumption of innocence compatible with the evidence in the case, and in law is always presumed to be innocent until his guilt is established by evidence, and such guilt must be established beyond a reasonable doubt; a mere preponderance of the evidence is not sufficient; and in this connection you are further instructed that a reasonable doubt which entitles an accused to be acquitted is a doubt of guilt of the crime charged in the information, arising from all the evidence in the case. The proof is to be deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment of ordinary minds with a conviction on which they would act, without hesitation in the most important concerns of life.”

“8. You are instructed that in order to warrant a verdict of guilty in this case as charged in the information, it is necessary for the state to prove, beyond a reasonable doubt, that defendant deliberately and maliciously made the assault and shot the prosecuting witness with intent to wound him, and that with such deliberately formed intentions he entered the premises of the prosecuting witness. In this connection the intent may be inferred by the jury from the acts committed by the accused, if the evidence warrant it; that is, the fact that the accused shot and wounded the prosecuting witness is sufficient in itself, unexplained by other circumstances, to establish the felonious

intent, unless you find from the evidence and facts surrounding the shooting and wounding that the accused had sufficient provocation for the assault or shooting to warrant him in shooting the prosecuting witness in self-defense."

The particular vice imputed to these instructions is that while they require the jury to be satisfied of the guilt of the accused beyond a reasonable doubt in order to convict of the crime charged in the information, they authorize a conviction for an assault and battery on a bare preponderance of the evidence. A careful examination of the charge above set out has satisfied us that it is subject to the criticism aforesaid. Not only are the jury authorized by paragraph 5½ to convict of an assault and battery, notwithstanding the evidence may be insufficient to establish guilt beyond a reasonable doubt, but the term "reasonable doubt," wherever used in the other paragraphs, is limited to the crime charged, and cannot by any reasonable or natural construction be said to apply to the offense of which the accused was convicted. There formerly existed a diversity of opinion upon the question whether the presumption of innocence was available to one accused of a mere misdemeanor in the sense that the prosecutor was required to establish guilt beyond a reasonable doubt; but the decided weight of authority may now be said to sustain the proposition that the rule which requires proof of guilt beyond a reasonable doubt applies to all criminal prosecutions, to misdemeanors as well as to felonies. (1 Bish., Crim. Proc., 1093; *Commonwealth v. Intoxicating Liquors*, 115 Mass., 142; *Fuller v. State*, 12 O. St., 433; *People v. Potter*, 89 Mich., 353.) For the reasons stated the judgment is reversed and the case remanded for further proceedings in the district court.

REVERSED AND REMANDED.

ROBERT G. BROWN, APPELLEE, v. H. E. STEIN, COUNTY  
CLERK, ET AL., APPELLANTS.

FILED JANUARY 3, 1894. No. 6084.

1. **Highways: DEDICATION: PROOF.** In order to establish the existence of a public highway over private property by dedication the *animus dedicendi* is essential, and must be clearly proved.
2. **Evidence examined, and held** insufficient to establish a dedication of the property in controversy as public streets.

APPEAL from the district court of Clay county. Heard below before HASTINGS, J.

The facts are stated in the opinion.

*J. L. Epperson & Sons*, for appellants, cited: *Likes v. Kellogg*, 37 Neb., 259.

*Leslie G. Hurd*, contra:

To constitute a dedication of private property for public streets an intention on the part of the owner to dedicate is absolutely essential, and unless such intention can be found in the facts and circumstances, no dedication exists. (2 Dillon, *Municipal Corporations*, sec. 636; *Irwin v. Dixon*, 9 How. [U. S.], 31; *Harding v. Jasper*, 14 Cal., 643; 2 Herman, *Estoppel*, sec. 1142; *City of Chicago v. Stinson*, 124 Ill., 610; *City of Chicago v. Hill*, 124 Ill., 646; *Gentlemen v. Soule*, 32 Ill., 271; *Harding v. Town of Hale*, 83 Ill., 506; *Kyle v. Town of Logan*, 87 Ill., 66; *Saulet v. City of New Orleans*, 10 La. Ann., 81.)

Post, J.

This was a proceeding in the district court of Clay county, by the appellee Brown, to restrain the defendant Stein, as county clerk, from recording an alleged plat of the

first addition to the city of Clay Center, and the defendant city from using and claiming the property hereafter described as public streets.

From the uncontroverted allegations of the pleadings it appears that in the year 1884 the plaintiff and two others caused to be laid out and platted the first addition to the said city. Said parties at the time named were the owners of a strip of land 93 feet in width at the north end and 113 feet wide at the south end thereof, adjoining the city on the west, and conforming in length with the west line of the city as originally laid out. The strip thus described is designated on the plat as block 18, and subdivided into lots marked consecutively from 1 to 54, inclusive of both numbers. Of said lots those marked from 21 to 23, inclusive, are 25 feet wide, all others being 50 feet wide, except lots 6, 20, and 40, the property in controversy, which are 80 feet, and correspond in width with the east and west streets of the city on which they abut. The plaintiff, who has by purchase acquired the rights of the other parties interested in said lots, alleges that he now holds them by title in fee-simple; that he has never dedicated or otherwise appropriated them to the use of the city, but that said city now uses and claims them as public streets, to-wit, as extensions of Glenville, Fairfield, and Harvard streets, upon which they abut, and has prepared a new plat of said addition, on which they are designated as parts of said streets, and which it threatens to file in the office of the county clerk, thereby casting a cloud upon his title. It is also alleged by the plaintiff, and not denied, that ever since said land was laid out and platted as aforesaid the property in controversy has been listed and assessed for taxation as lots 6, 20, and 40 of block 18, in the said addition, and that he has paid all taxes thus assessed against them for state, county, and city purposes. There is no claim by the city that the property in controversy, or any part thereof, has been acquired for public use by purchase or condemnation;

nor is it seriously contended that the act of laying out and platting the strip known as "Block 18" amounts to a dedication of the lots or tracts in question as highways, notwithstanding they conform in width to the streets of the city, and, but for their designation as lots, might seem to be extensions thereof. The reliance of the city as already indicated is upon a common law dedication. In addition to the facts above stated it appears from the bill of exceptions that block 18 was bounded on the west by the property described in the record as the "Kincaid Pasture," and used for agricultural purposes by the proprietor.

In the month of September, 1886, certain other parties purchased a part of the property last mentioned and laid out Eller's addition, adjoining block 18. Afterward the Kansas City & Omaha Railroad Company located its depot and side tracks in Eller's addition, which rendered access thereto across said block desirable, if not necessary. It seems to have been understood at the time the last-named addition was laid out that the streets of the city did not extend through block 18, since Eller, one of the proprietors thereof, who held the title to the premises by deed from Kincaid, represented to the latter, at the time of the purchase from him, that it would cost about \$2,000 to open the streets through block 18; and at another time Messrs. Martin and Dixon, who were also interested in said addition, visited plaintiff at his home in Sutton to negotiate for the opening of said streets. It is shown that since the construction of the railroad through the city, in 1877, one or more of the lots in controversy have been in constant use as a street by the public, and continues to be the only road connecting Eller's addition with the city proper. It is further shown that the city has graded one of the lots, to-wit, lot No. 20, claiming it to be an extension of Fairfield street, and has caused some sidewalks to be constructed on each of them, but neither the date, amount, nor value of such improvement is apparent from the record.

It does not appear that the plaintiff ever recognized the claim which the city now asserts to the lots. On the other hand, he testifies, without contradiction, that he always asserted his title thereto; that he has frequently urged the city authorities to purchase or condemn them for use as streets, but that no action was taken, for the alleged reason that there were no funds available for that purpose. In the month of July, 1877, he caused a stout board fence to be built across the front of lot 20, apparently the one most used by the public, after notifying the city authorities of his intention to do so, but which was removed a few hours later by parties unknown to him. He admits that the purpose of the proprietors of the addition in making the lots in question conform in width to the streets was to subsequently dispose of them to the city. He testifies further as a reason for demanding compensation for them, that as one of the proprietors of the original town he had been obliged to give away a large number of lots in order to secure the location there of the county seat. The proof fails to show that any person was induced to purchase or improve property in the city, or either of the additions named, in the belief that the streets extended through block 18. The most that can be claimed is, that a general understanding existed that in consequence of the extension of the city in that direction, a corresponding extension of the streets would eventually be required. The district court found for the plaintiff upon all of the issues and entered a decree in accordance with the prayer of the petition. With that decree we are entirely satisfied. It is clear from the record that the *animus dedicendi*, which is essential in order to create an easement in favor of the public, is wanting. The rule is too well settled to now admit of controversy, that in such cases the intention to dedicate is essential and must be clearly shown. (See *Graham v. Hartnett*, 10 Neb., 517; 2 Dillon, Municipal Corporations, 499.) In this state private property cannot, without the

consent of the owner, be taken or used for public purposes without compensation therefor. (Bill of Rights, sec. 13.) It was incumbent upon the city in this case to show affirmatively the intention of the plaintiff to appropriate the lots in controversy to the use of the public as streets, or such facts as would in equity estop him to now deny such intention; but, as we have shown, there is upon that proposition a failure of proof.

2. We are referred as sustaining the contention of the city to the case of *Likes v. Kellogg*, 37 Neb., 259. That case we think differs essentially from the one under consideration. There the intention to dedicate is evident from the facts stated. The tracts or parcels of land there in controversy were not designated as lots, nor were there any facts apparent from the recorded plat, or otherwise, indicating private ownership, or that they had been listed or assessed for taxation. On the other hand, numerous persons, nineteen or more, were induced by the conduct of Stone, the proprietor, and his agent to purchase property and make valuable and lasting improvements in the addition therein named, in the belief that the spaces between the blocks as laid out and platted were, in fact, streets.

3. Proof was offered tending to show that the original plat of block 18 bears evidence of having been altered. The evidence of the county clerk is that shortly after the filing of the plat of Eller's addition some one inquired for the plat of the first addition, and, on producing it, he observed that the east line of the lots in controversy had been erased, but whether before the filing of the plat or subsequent thereto he cannot say. He subsequently examined the plat and found the lines in question had been restored. It is not shown that the plaintiff, or his agents, had access to the records, nor does the city attempt to explain such apparent alterations, while the plaintiff testifies positively that the exterior lines of the said lots were all shown upon the plat as originally prepared and filed. On that point he

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is strongly corroborated by the surveyor who prepared the plat, Mr. Groff. The finding of the district court upon that, as well as upon all controverted propositions, was for the plaintiff, and is clearly in accordance with the evidence. The decree is right and is

AFFIRMED.

LEONIDAS K. HOLMES ET AL., APPELLANTS, V. JANE G. HUTCHINS ET AL., APPELLEES.

FILED JANUARY 3, 1894. No. 5359.

1. Mechanics' Liens: MORTGAGES: PRIORITIES. The proviso in section 6, chapter 54, Compiled Statutes (the mechanic's lien law of the state), that "this law shall not be so construed as to interfere with prior *bona fide* liens on grounds on which such buildings shall be erected as a fixture," *held*, to forbid subordinating the priority of a recorded mortgage on such grounds to a subsequently attaching mechanic's lien.

2. ———: STATEMENT: DESCRIPTION OF LAND. One who claims the benefits of the mechanic's lien law must show a substantial compliance with each essential requirement thereof, one of which is that the sworn statement to be filed shall contain a description of the land upon which the labor was done or material was furnished for the purpose contemplated by such law. A description of property in such statement which is entirely inapplicable to the land actually benefited cannot be made effective to any extent for the purpose of subjecting the land actually built upon to the operation of the lien claimed.

3. ———: ———: RECORD OF LIEN: NOTICE. The binding force of the law creating and regulating mechanics' liens in favor of a lienor, as against a purchaser of the premises sought to be subjected to such lien, depends upon the required sworn statement being filed of record within the time fixed by the statute for that purpose. As between such parties, and for the purpose stated, the notice imparted by filing the prescribed statement is an essential prerequisite, the want of which can neither be supplied by other proof, nor supplemented by a decree of court.

38	601
38	655
38	830
38	601
40	184
40	581
41	853
41	855
38	601
44	821
38	601
49	736
38	601
49	489
49	686
52	421
38	601
57	653

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4. ———: MORTGAGE PRIORITIES. The mere knowledge of a grantor that his grantee intends to build upon the lot which is the subject-matter of the conveyance between them will not operate to postpone the priority of a purchase-money mortgage in favor of such grantor to a mechanic's lien for material subsequently furnished for the erection of a building on said lot. To bring about this result, the grantor must in some manner be a promoter of the improvement contemplated.

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

*J. R. Webster*, for appellant *L. K. Holmes et al.*:

The vendor who sells his property with stipulation that the vendee build, subjects his property to liens for such construction. This liability he cannot absolve by afterwards conveying and taking a mortgage for purchase money. By the mere device of circuitry he cannot free the property of the equity of lien fastened upon it by his contract. (*Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Rollin v. Cross*, 45 N. Y., 767; *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn., 454; *Seitz v. Union Pacific R. Co.*, 16 Kan., 133; *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272; *Hill v. Gill*, 40 Minn., 443; *Paulsen v. Mausker*, 126 Ill., 78; *Henderson v. Connolly*, 123 Ill., 98; *Hackett v. Badeau*, 63 N. Y., 476; *Hilton v. Merrill*, 106 Mass., 528; *Smith v. Norris*, 120 Mass., 58; *Davis v. Humphrey*, 112 Mass., 309; *Bickel v. James*, 7 Watts [Pa.], 9; *Woodward v. Leiby*, 36 Pa. St., 437; *Keller v. Denmead*, 68 Pa. St., 449; *Clark v. Parker*, 12 N. W. Rep. [Ia.], 554; *Moore v. Jackson*, 49 Cal., 109; *Parker v. Bell*, 73 Mass., 429; *Weber v. Weatherby*, 34 Md., 661; *Tanner v. Bell*, 61 Ga., 584.)

As to lien covering two properties, the lien will not fail because the material was used in two separate buildings, nor because of error of description as to one of them. The mechanic's lien law is liberally construed, and was framed with view to get rid of all technical difficulties, and will

be construed and enforced to effect its purpose. (*Great Western Mfg. Co. v. Hunter*, 15 Neb., 36; *Rogers v. Omaha Hotel Co.*, 4 Neb., 59; *Knutzen v. Hanson*, 28 Neb., 595; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Doolittle v. Plenz*, 16 Neb., 156; *Ballou v. Black*, 17 Neb., 398.)

The owner and mechanic, by convention between themselves, can bind the property, and subsequent purchasers with notice, or a vendee, by convention with his vendor, would be bound by it. It makes no difference whether the lien was good or not. It was assumed and made good by the convention of the parties. (*Kruger v. Harvester Co.*, 9 Neb., 533; *Skinner v. Reynick*, 10 Neb., 324; *Knutzen v. Hanson*, 28 Neb., 596; *Keedle v. Flack*, 27 Neb., 839; *Cooper v. Foss*, 15 Neb., 520; *Koch v. Losch*, 31 Neb., 627.)

*S. L. Geisthardt*, for appellant Abner Heater :

There can be no mechanic's lien for materials furnished on a general account, solely on the credit of the person ordering them, even though they are afterwards used in the construction of a building on which a lien is claimed. (2 Jones, Liens, secs. 1326, 1327, 1330; *Holmes v. Richet*, 56 Cal., 307; *Talbott v. Goddard*, 55 Ind., 496; *Crawfordsville v. Brundage*, 57 Ind., 262; *Campbell v. Furness*, 1 Phila. Rep., 372; *Wisconsin Planing Mill Co. v. Grams*, 72 Wis., 275.)

There can be no mechanic's lien on separate and disconnected parcels, by virtue of a general claim filed jointly against all, without a separation of the items so as to show what materials are justly chargeable to each parcel. (Phillips, Mechanics' Liens, secs. 376, 377, and cases cited; *Chapin v. Persse*, 30 Conn., 461; *Girard P. S. Co. v. Southwark F. Co.*, 105 Pa. St., 248; *Morris County Bank v. Rockaway Mfg. Co.*, 14 N. J. Eq., 193, 16 N. J. Eq., 150; *Dalles L. & M. Co. v. Wasco W. M. Co.*, 3 Ore., 527; *Gor-*

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*gas v. Douglas*, 6 S. & R. [Pa.], 512; *Weaver v. Sells*, 10 Kan., 609.)

A substantial compliance with the statute is a condition precedent of a mechanic's lien. The recorded statement must, with substantial accuracy and certainty, describe the property upon which a lien is claimed. (2 Jones, Liens, secs. 1389, 1391, 1421; Phillips, Mechanics' Liens, secs. 377, 378, 386; *Meyer v. Berlandi*, 39 Minn., 438; *Lindley v. Cross*, 31 Ind., 109; *Knox v. Starks*, 4 Minn., 7; *White Lake Lumber Co. v. Russell*, 22 Neb., 129; *Girard P. S. Co. v. Southwark F. Co.*, 105 Pa. St., 248.)

An error in the statement claiming a mechanic's lien cannot be corrected, nor an omission supplied, after the expiration of the time for filing the claim. A mechanic's lien claim is not an instrument which can be reformed by a court of equity. The court cannot dispense with a compliance with the statute, or create a substitute. (2 Jones, Liens, secs. 1389, 1390, 1391; Phillips, Mechanics' Liens, sec. 386; *Meyer v. Berlandi*, 39 Minn., 438; *Lindley v. Cross*, 31 Ind., 109; *Simpson v. Murray*, 2 Pa. St., 76.)

A mechanic's lien cannot be created by agreement or convention between the parties. (*Lyon v. Elser*, 72 Tex., 304.)

*Samuel J. Tuttle*, for appellee Clark & Leonard Investment Company *et al.*:

In our state the lien of a mechanic dates from the commencement of labor or furnishing of material. (Comp. Stats. Neb., ch. 54; *Choteau v. Thompson*, 2 O. St., 114.)

The mechanic's lien law cannot be so construed as to interfere with prior *bona fide* liens on grounds on which the building shall be erected as a fixture. (Comp. Stats. Neb., ch. 54, sec. 6.)

The fact that the mortgage was made in contemplation of building, and the money covered thereby was to be advanced from time to time, does not render the interest of the mortgagee inferior, or postpone the lien of the mortgage

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to mechanics' liens attaching after the registration of the mortgage. (*Platt v. Griffith*, 27 N. J. Eq., 207; *Moroney's Appeal*, 24 Pa. St., 372; *Taylor v. La Bar*, 10 C. E. Greene [N. J.], 222; *Macintosh v. Thurston*, 10 C. E. Greene [N. J.], 242; *Martsolf v. Barnwell*, 15 Kan., 461.)

Our law provides that the contract, the basis of the lien, must be made "with the owner." A mortgagee is not an owner within the meaning of the statute. (*McHugh v. Smiley*, 17 Neb., 623; *Fuquay v. Stickney*, 41 Cal., 583; *Hazelton v. Webb*, 4 Neb., 308.)

*John H. Ames*, for appellee Emma H. Holmes, administratrix, on the question of priority of the purchase-money mortgage over the mechanics' liens, cited: *Hill v. Aldrich*, 50 N. W. Rep. [Minn.], 1020; *Haupt Lumber Co. v. Westman*, 52 N. W. Rep. [Minn.], 33; *Martsolf v. Barnwell*, 15 Kan., 612; *Chicago Lumber Co. v. Schweiter*, 45 Kan., 207; *Taylor v. La Bar*, 25 N. J. Eq., 222; *Newark Lime & Cement Co. v. Morrison*, 13 N. J. Eq., 133; *Bridwell v. Clark*, 39 Mo., 170; *Hoover v. Wheeler*, 23 Miss., 314; *Morse v. Dole*, 73 Me., 351; *Brown v. Morison*, 5 Ark., 217; *Getto v. Friend*, 46 Kan., 24.

*Lamb, Ricketts & Wilson, Davis & Hibner, Mockett, Rainbolt & Polk*, and *Harwood, Ames & Kelly*, for other appellees.

RYAN, C.

1. Leonidas K. Holmes and the First National Bank of Lincoln began this action against Jane G. Hutchins and C. H. Hutchins, as the owners of lot 12, in block 41 of said city, and the west half of lot 13 in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east. The other defendants named were originally joined by reason of having claims for, and liens upon, the above described property, with such exceptions

as will demand separate notice by reason of special circumstances. The First National Bank of Lincoln was joined as plaintiff with Leonidas K. Holmes solely by reason of having obtained under Holmes a right to payment out of the proceeds of such recovery as said Holmes might ultimately be decreed entitled to. The action, therefore, in general terms, should be treated as—in effect it simply was—an action on behalf of Leonidas K. Holmes against the real property above described for the enforcement of a lien under our mechanic's lien law, by reason of his having furnished material for the erection of buildings thereon. While there were many liens adjudicated by the judgment of the trial court, there are but two defendants with whom Leonidas K. Holmes has serious contention in this court. One of these adversaries is the representative of W. W. Holmes, who died while this action was pending; the other is Abner Heater.

2. The petition contained all proper and necessary averments for the foreclosure of a mechanic's lien as against the real property involved. In respect to the claim of L. K. Holmes for a lien, which was filed in the proper office on July 13, 1889, against lot 12, block 41, above named, there was a sufficient compliance with the statute to entitle the claimant to a lien thereon from the date of furnishing the first material described, to-wit, March 1, 1889. The contract, in pursuance of which the materials were furnished by L. K. Holmes, was, as he averred, with J. G. and H. C. Hutchins, the owners of the property sought to be subjected to the lien. In respect to the rights and interest of the defendant W. W. Holmes, who was living when the petition was filed, the sole allegations of the petition were as follows: "The other defendants, the Clark & Leonard Investment Company, Pennsylvania Company of Insurance on Lives, Philadelphia Mortgage & Trust Company, Badger Lumber Company, National Lumber Company, and W. W. Holmes, are holders of sundry mortgages on portions

of said premises, \* \* \* some of them having liens on one piece only of said property, and some on both pieces of property; and they are therefore made defendants to this action. The exact amount and the priority of the liens in said property claimed by said defendants, if any amount is due, the plaintiff is unable accurately to state." The prayer of the petition was (omitting language not now necessary to quote) as follows: "Wherefore the plaintiff prays the court that an accounting may be taken of and concerning the liens on said property, and the amount due the plaintiff may be ascertained, as well as the amounts due the several defendants, and that the priority of the liens may be adjudicated and determined; and that unless the sum due the plaintiff be paid by a short day to be named by the court, that said premises be sold and the proceeds applied by the court to pay the liens in the order of their priority; that in the meantime a receiver may be appointed to take charge of said property and collect the rents thereof, and to hold the same subject to the order of the court, to be applied in proportion on the liens on said property in the order of their priority, \* \* \* and for such other, further, or different relief as plaintiff in equity is entitled to have, and for costs." The mortgage to W. W. Holmes was of date February 19th, 1889, and was filed for record two days thereafter, and, as already observed, the first item furnished by L. K. Holmes was March 1st following.

Tested by these considerations alone, the mortgage to W. W. Holmes created in his favor the first lien. It is insisted, however, that this order of priority is reversed by the fact that W. W. Holmes sold the lot in question with the expectation, and it might further be said with the hope, that a building, which he expected would be erected on the lot in question by the grantees, would give increased value to the property upon which his mortgage operated as a lien. The case of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719, is con-

fidently relied on as sustaininig the views contended for, and it is likewise insisted that *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272, reinforces the contention made on this head. In the case last referred to it was said that the company making the conveyance probably had knowledge of the design of the grantee to boom the property conveyed by the erection thereon of the Park House. Whether or not the grantor company was more directly interested than to the extent of having knowledge of the design ascribed to grantee company was, in the opinion, declared to be the question essential to the determination of the appeal under consideration. As to this very important proposition it was said: "It seems to us, upon a review of all the facts in the case, that the conclusion is unavoidable that these companies were engaged in a joint enterprise, to-wit, the booming of this property; that in furtherance of the interest of both parties this contract was made for the erection of the Park House by the Plattsmouth Investment Company, as well as by the Plattsmouth Land & Improvement Company," the grantor and grantee companies above referred to. The decision of the case from which we have just quoted was based upon the conclusion reached; i. e., that the two companies were really participants in the erection of the Park House for the furtherance of the interests of both companies; that one was more obviously so than the other, being the only real difference. In *Bohn Mfg. Co. v. Kountze*, *supra*, the action was against Herman Kountze, the owner of the fee, and Z. B. Berlin, the equitable owner, in possession under a contract of purchase with Kountze. This contract contained the following provisions: "And it is hereby expressly understood and agreed, and is a part of the consideration for the sale of said lot to said Z. B. Berlin, that the said Z. B. Berlin agrees and binds himself, his heirs, executors, and assigns, to build, or cause to be built, on said lot a good, substantial, new dwelling house, costing not less than twenty-five hun-

dred dollars, and if more than one dwelling is erected on said lot, then each such dwelling shall cost not less than twenty-five hundred dollars, exclusive of all other improvements that may be put on said lot, such house or houses to be built on good substantial brick or stone foundations. The said dwelling shall be commenced within eight months from the date hereof, and be fully completed within twelve months from the date hereof, time being of the essence of this contract, and the improvements provided for being a part of the consideration to be paid for said lot. Therefore, should said Z. R. Berlin for any reason fail or neglect to build such building as herein provided for, and within the time specified, then, at the option of said first party, and for the reason that said improvements have not been made as stipulated, this contract may be declared forfeited by said first party, with all the penalties herein provided for." In addition to the provisions contained in the language just quoted, the contract provided that upon request Kountze would advance not to exceed \$2,200, to be used in paying for labor and material for use in the house required to be built, said money to be subject to check by Berlin as soon as Kountze should receive notice of the commencement of work on the building. These checks were required to be countersigned by Kountze before the bank upon which they were drawn should be authorized to pay them. The conveyance by warranty deed, contemplated by the contract, was only to be made upon full compliance with the several terms of the contract, time being of the essence of the contract. In the consideration and determination of this case no new doctrine of law was announced. It was simply held that the facts of that case constituted such a relation between the parties to said contract that the interest of each of such parties in the property thereby required to be improved was liable as the interest of an owner under the provisions of the mechanic's lien law. The contract itself required Berlin to build upon the land, Kountze in the

meantime holding the title; and it was not in violation of this language, rather the contrary, to assume that in this manner, as owner, Kountze authorized the erection by him required. If, as the court found, Kountze was privy to the contract for the erection of a building on the premises, the legal title of which was in himself, his interest in the land was directly affected by the provisions of the mechanic's lien law in force, because, as an owner, he had in effect contracted for the material and labor indispensable to the building of the house required to be erected.

A quotation relative to this case from the opinion in *Pickens v. Plattsmouth Investment Co.*, *supra*, though it may be open to the objection that it is a vain repetition, has at least the advantage that it cannot be considered as a new departure from propositions of law previously recognized and enforced. With no other apology, therefore, the following language is reproduced: "By this it was not held that where the owner of the land sells it, and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has recently been held by this court, in *Henry & Coatsworth Co. v. Fisherick*, 37 Neb., 207, that where one furnishes money to build a house, for which he took a mortgage upon the premises whereon the erection was to be made, the record of such mortgage gave it a priority to the rights of material-men and mechanics who began to confer value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of a mechanic's lienor it must appear that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be im-

plied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material; it must be established by the proofs, or be as fairly inferable from the facts as any other independent fact or proposition."

The same result is reached upon a careful consideration of the pleadings in the case at bar. It has already been shown that the petition was one solely for the foreclosure of a mechanic's lien. It contained no averment of any agreement or understanding between W. W. Holmes on the one part and J. G. and H. C. Hutchins on the other, that the latter were even expected, much less required, to erect a building upon the premises sold to them.

The deed of W. W. Holmes, and the mortgage back for security of the purchase price unpaid, embraced all understandings between the parties, and in them was contained no intimation of any such relation as was shown to exist between the parties to the contract described in *Bohn Mfg. Co. v. Kountze*, *supra*; hence any proof to establish that relation was irrelevant as well as immaterial. This want of averment is not cured by the reply of L. K. Holmes, which was in the following language: "Now come the said plaintiffs, and for reply to the answer and cross-petitions of the several parties hereto deny all new matter set up therein and allege said W. W. Holmes sold said lot 12, in block 41, to C. H. Hutchins and Jane G. Hutchins with condition and obligation to build thereon, and Clark & Leonard Investment Company made said loan with obligation and agreement to build, and thereby subjected their interests to the lien of the plaintiff." It is not the province of a reply to introduce a new or different cause of action from that stated in the petition. (*Savage v. Aiken*, 21 Neb., 605; *Hastings Sch. Dist. v. Caldwell*, 16 Neb., 68.) The averments of the petition, even if each is conceded true, only entitle the plaintiff to the foreclosure of a mechanic's lien. The action being therefore reduced to a contest be-

tween the claimant of a mechanic's lien on the one hand, and the holder of a mortgage, the lien of which had attached before the mechanics' lien had its existence, on the other, as against the lot mortgaged, improved, and sought to be subjected to the payment of both claims, it would seem that the proviso closing section 6, chapter 54, Compiled Statutes, is not wholly irrelevant. This section, it is true, refers in the main to the power of the court in which foreclosure proceedings are pending to cause the property sought to be affected by the mechanic's lien being foreclosed to be leased *pendente lite*. At the close of the section, however, is this language: "*Provided*, This law shall not be so construed as to interfere with prior *bona fide* liens on grounds on which such buildings shall be erected as a fixture." As this language is properly applicable to the whole law regulating mechanics' liens and their enforcement, is contained in the very statute under which such lien claimants derive their rights and remedies, and is but the enunciation of a rule just in itself, it must be held an inhibition on the power of courts to postpone to mechanics' liens prior existing valid liens on grounds on which improvements have subsequently been made. It follows from all these considerations that the district court properly held the lien of the mortgage to W. W. Holmes paramount to that of Leonidas K. Holmes for materials furnished.

3. It is not required that what has already been said as to the general purport of the petition of L. K. Holmes should be repeated. After reciting the filing of an itemized statement of account for material furnished for use in the erection being made upon said lot, the petition referring to said filed statement used the following allegation:

"In the drafting of said mechanic's lien the scrivener, by whom said lien was drawn, erroneously described one of said lots in this: that in said lien was written 'Richards' subdivision of lot 64' instead of 'Little & Alexander's subdivision of lot 63,' which was intended and was the real

description of said property, and the error was not discovered until on or about the 11th day of September, 1890; but the said building on the west half of lot 13 of Little & Alexander's subdivision of lot 63 of Little's subdivision carried prominently upon its front the names of J. G. and C. H. Hutchins, and was known as 'Hutchins Block,' and was the only building owned by the said J. G. and C. H. Hutchins on the north side of O street between Fourteenth and Seventeenth streets, and was the only brick building owned by J. G. and C. H. Hutchins anywhere in Little's subdivision of the west half of the southwest quarter of said section 24; and the said J. G. and C. H. Hutchins are still the owners of said property, and the rights of no innocent purchaser have attached, and all parties claiming an interest in said property have obtained the same with full notice of plaintiff's rights."

A part of the prayer of said petition has already been set out and needs now only to be referred to for consideration in connection with the remainder of said prayer, which, referring to the above erroneous description, was as follows :

"That at the hearing of this cause the erroneous description in said lien may be corrected, and said lien held and adjudged to be a good and valid lien upon the west half of lot 13, in Little & Alexander's subdivision of lot 63 of Little's subdivision of the west half of said section 24, instead of lot 13 in Richards' subdivision of lot 64 of Little's subdivision as in said lien written; and that the rights of the plaintiff therein may be saved to him, and the proceeds of said lien be applied on said note of \$3,400 and interest; and that in event said reformation be not granted by the court, that the defendants having liens upon both pieces of property may be required to first exhaust the piece of property on which the plaintiff is not permitted to have a lien, so that the plaintiff's security may be impaired as little as may be by such mistake in description;

and for such other, further, or different relief as plaintiff in equity is entitled to have, and for costs."

There was proper issue joined in respect of the matter of the erroneous description above alleged, and in respect to this branch of the case the action of the court is thus recited in a journal entry, which constitutes part of the record:

"This cause came on for hearing on the motion of the plaintiff to correct the entry of the findings and decree heretofore made in this cause and was submitted to the court, on due consideration whereof the court finds that at the rendition of the decree heretofore entered herein, to-wit, on November 27, 1891, and of record in Journal X at page 597, it was actually determined and found by the court that a part of the real estate on which plaintiff claims a mechanic's lien is correctly described as the west half of lot 13, in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east; that in drafting the mechanic's lien of plaintiff mentioned in the petition, the scrivener by whom the same was drawn, in writing said description, erroneously used the words 'Richards' subdivision of lot 64' instead of 'Little & Alexander's subdivision of lot 63,' as was by plaintiff intended to be written, and which was the true and proper description of said property; that the building upon the west half of said lot 13 bore prominently upon its front the names of J. G. and C. H. Hutchins, and was known as the 'Hutchins Block,' and was the only building owned by J. G. and C. H. Hutchins in Little's subdivision of the west half of the southwest quarter of said section 24; that said J. G. and C. H. Hutchins were still owners of said property at the commencement of this suit; that defendant Heater purchased said premises from said J. G. and C. H. Hutchins since the commencement of this suit, and the sum of \$1,700 and accrued interest on account of the plaintiff's claim of

mechanic's lien was deducted from the purchase price as a part of the consideration by him paid, and that plaintiff is entitled to have the said error in his mechanic's lien corrected; but that in entering up said decree all of the said findings of fact so determined by the court were, by inadvertence and mistake, omitted therefrom.

"It is therefore considered and ordered by the court that the entry of said findings and decree be corrected and reformed so as to include the said findings, and to correct plaintiff's mechanic's lien as follows: A part of the real estate on which plaintiff claims a mechanic's lien is correctly described as the west half of lot 13 in Little & Alexander's subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east; that in drafting the mechanic's lien of plaintiff mentioned in the petition, the scrivener by whom the same was written erroneously used the words 'Richards' subdivision of lot 64' therein instead of said 'Little & Alexander's subdivision of lot 63,' as was by plaintiff intended to be written, and which was the true and proper description of said property; that the building on the west half of said lot 13, on which plaintiff claims a mechanic's lien, bore prominently upon its front the names of J. G. and C. H. Hutchins, and was known as 'Hutchins Block,' and was the only building owned by J. G. and C. H. Hutchins in Little's subdivision of the west half of the southwest quarter of said section 24; that said J. G. and C. H. Hutchins were still owners of said property at the commencement of this suit; that defendant Heater purchased said premises from said J. G. and C. H. Hutchins since this suit was commenced, and the sum of \$1,700 and accrued interest, on account of the plaintiff's claim of mechanic's lien, was deducted from the purchase price thereof as a part of the consideration by him paid therefor, and that the plaintiff is entitled to have the said error in his mechanic's lien corrected.

"It is further considered by the court that the error in the description of said premises appearing in the mechanic's lien of plaintiff be corrected and reformed so as to read 'Little & Alexander's subdivison of lot 63' instead of 'Richards' subdivision of lot 64,' as erroneously written, and that said decree in all other respects stand as heretofore entered. To all of which defendant Heater excepts."

The appellant, Abner Heater, contends that the court, in a proceeding of this kind, had no authority to subject to the mechanic's lien claimed by L. K. Holmes the half of the lot against which the claim for a lien by being reformed was made operative, the said Heater in the interim having purchased the property thus subjected to the claim of L. K. Holmes. It is insisted by counsel for L. K. Holmes that as Heater bought the property with the constructive knowledge of the pendency of a suit to reform the erroneous description alleged necessarily incident to filing a notice *lis pendens*, the reformation of the claim for a lien decreed as prayed became as fully operative against Heater as though the original filing of the claim for a lien was as void of mistake as it was after its reformation by the court. Without doubt the mechanic's lien law should receive a liberal construction with a view to effectuate the remedy given by statute. In the early history of legislation upon this subject, courts seemed hostile to the remedies given by this statute, and were astute in discovering means whereby its operation might be avoided. In this respect other innovations by statute have met with as little encouragement, as in respect to the statute of limitations and others that might be cited. The most noted instance of this kind was the opposition to the adoption of the code of civil procedure in the several states wherever it has been adopted, notably in the early legislation on that subject. In many adjudications under such innovations of statute it was necessary again and again to insist that the several statutes enacted, being remedial in their nature, should receive a liberal con-

struction to effectuate the remedies provided. It has never been held, so far as we are aware, that in aid of such statutes new rights were by the court to be created, nor existing rights deemed destroyed. It is but equitable that one shall be recompensed for his labor or material contributed for the improvement of the property of another. (*Miller v. Hollingsworth*, 36 Ia., 163.) The mechanic's lien law recognizes this equity of the contributor as against the property benefited for the repayment of the value of his contribution. The provisions of the mechanic's lien law, aside from the recognition of this equity, are devoted, first, to the manner of enforcing the right recognized, and second, to providing for the protection of third parties in respect to notice of this claim for remuneration. For the period of four months from the date of the last item furnished, the progress of the work, or its recent completion, is supposed to impart ample notice that the laborers and material-men contributing to the erection have a lien on the property thereby rendered more valuable. If such material-man or laborer desires to prolong his lien for two years, he is required only to file a sworn statement containing such facts as would fully advise the public of the nature and amount of his lien, as well as indicate the property thereby to be affected. Within the four months given the notice is chargeable upon presumed ocular observation; after the expiration of that time it is implied from an *ex parte* statement, sworn to, and filed in a public office as one of its records. This recorded statement creates no new rights as against third parties; it only gives constructive notice to them of a claim to a lien recognized by the statute; and by giving such notice the right to enforce the lien claimed is perpetuated for two years. If the required statement is not filed, or if it is so defective as not to impart notice of the property sought to be charged, there survives after the four months no right to such lien as against purchasers. As to third parties, the filing of the statement entitling to

a lien is a matter of substance with which there must be a substantial compliance to entitle to the enforcement of the lien claimed as against third parties dealing with the property sought to be charged. (Jones, Liens, secs. 1389 *et seq.*; Phillips, Mechanics' Liens, sec. 378; *Lindley v. Cross*, 31 Ind., 109; *Knox v. Starks*, 4 Gil. [Minn.], 7; *Simpson v. Murray*, 2 Pa. St., 76; *White Lake Lumber Co. v. Russell*, 22 Neb., 129.)

In *Keith v. Tillford*, 12 Neb., on page 273, occurs this language of COBB, J.: "There can be no doubt of the correctness of the proposition to which plaintiffs in error cite numerous authorities, that where the statute confers a right and prescribes adequate means of protecting it the proprietor of the right is confined to the statutory remedy." In *Simpson v. Murray*, *supra*, it was held that where a mistake of the nature of that made in filing the statement of L. K. Holmes had originally been made, it could not be cured in *scire facias* or other proceedings to enforce the lien claimed. It seems therefore, ordinarily, to result that as between L. K. Holmes and Abner Heater, the filing of such a defective statement as was filed could not be cured by evidence of actual notice to Heater that Holmes claimed such a lien, nor from such notice as was necessarily implied by the pendency of a suit to reform the contents of such statement to a compliance with the statute.

4. It is insisted, however, that part of the consideration for the conveyance of this property to Heater was his agreement to pay this claim of L. K. Holmes. In the deed of conveyance to Heater it was recited that he assumed and agreed to pay all liens and incumbrances upon the property conveyed. It has already been shown, however, that this was neither a lien nor an incumbrance upon the property; hence, this language does not bind Heater to pay the claim of L. K. Holmes. The finding of the trial court was not that Heater assumed or agreed to pay the claim of L. K. Holmes, but it was that as part of the

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consideration paid for the property Heater deducted \$1,700 and accrued interest on account of the claim of L. K. Holmes to a mechanic's lien. It is not at all clear from this finding whether a right of action exists in favor of any one for the recovery of this \$1,700 and accrued interest. The most natural inference to be drawn from the language used is, that if such cause does exist, it is rather in favor of Heater's grantors than in favor of the holder of the alleged lien, for there is no proof of an agreement by him to assume, become liable for, or pay this claim made by L. K. Holmes. The finding goes as far as the evidence justifies, and upon it L. K. Holmes could base no right of action against Heater. If such right of action existed, however, between the parties to whom reference has just been made, it would not justify granting the relief sought by the petition in this case, for, as already noted, that relief was confined to the enforcement of a mere lien against the property for the payment for material furnished upon a contract with J. G. and C. H. Hutchins. Incidentally, to be sure, the reformation of the statement filed for such lien was sought, and yet the relief was solely the enforcement of a specific lien. There was no prayer for a personal judgment against Heater, as there should have been to sustain any proper claim for relief founded upon his alleged liability for the amount of this lien. Indeed, there was no averment from which it could be inferred that Heater was at all personally liable. It may be possible that Heater assumed payment of this claim of L. K. Holmes as part of the consideration, and in an action for the recovery of the same upon the said undertaking of Heater that he should be held liable, but upon this proposition no guess will be hazarded, for it would be foreign to any issue tendered or joined in this case, to say nothing of the unsatisfactory nature of the proof to justify it. Clearly, however, the decree rendered in favor of L. K. Holmes as against the west half of lot 13, in Little & Alexander's

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subdivision of lot 63 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, township 10, range 6 east, sixth P. M., must be reversed and said half lot adjudged the property of Heater, free of any lien in favor of L. K. Holmes. For the reasons given, the judgment of the district court is reversed and a decree directed, in this court in accordance with this opinion.

DECREE ACCORDINGLY.

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38	630
43	902
38	630
460	871

JOHN D. KILPATRICK ET AL., APPELLEES, V. KANSAS CITY & BEATRICE RAILROAD COMPANY ET AL., APPELLEES, IMPLEADED WITH NEW YORK SECURITY & TRUST COMPANY, APPELLANT, AND E. P. REYNOLDS & COMPANY, INTERVENORS.

FILED JANUARY 3, 1894. No. 5034.

1. **Mechanics' Liens: MORTGAGES: PRIORITIES.** Between an investment company and certain individuals it was agreed that the former should furnish, substantially, all the money necessary for, and to be used in, the construction of a proposed railroad and take their notes therefor, their payment to be guarantied by an existing railroad company, controlled by such individuals; that they should execute and file a certificate of incorporation of the proposed railroad, and execute, or cause to be executed, in its name, a mortgage on its anticipated property to secure its negotiable bonds, to be issued by it and deposited with the investment company as collateral security for said notes. At the date of the execution and delivery of such bonds and mortgage, pursuant to said agreement, and at the date of the record of such mortgage, such proposed railroad company had acquired no property, right of way, or franchises, and had taken no step towards the acquisition of either, further than the filing of its certificate of incorporation and the naming of its board of directors and officers, of all which facts the investment company had knowledge. The money agreed to be furnished by the investment company was by it paid over to the individuals afore-

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said, they then being officers of the proposed railroad company, to be by them expended in the construction of said proposed railroad; and such individuals entered into contracts in the name of such railroad company for labor and material used in the building of its said road, but failed to pay therefor. *Held*, That the investment company should be regarded as a promoter and builder of the railroad, and was not entitled to have the mortgage decreed a lien upon the property and franchises of the railroad constructed, superior to the statutory liens against the same for labor and material furnished in its construction. . POST, J., with RYAN and IRVINE, CC., dissenting.

2. A waiver of a mechanic's lien will not be inferred merely from the taking of collateral security from another, and in a manner not inconsistent with the retention of the lien.
3. A former adjudication in the federal courts on the subject-matter of a controversy cannot be taken notice of in the state courts unless properly presented by the pleadings and proofs.

APPEAL from the district court of Gage county. Heard below before APPELGET, J.

*Hornblower, Byrne & Taylor, Warner, Dean & Hagerman, and Griggs & Rinaker*, for appellant.

*Harwood, Ames & Kelly, I. P. Dana, and R. S. Bibb*, for appellees.

*Marquett, Dewese & Hall*, for intervenors.

See opinions for authorities upon the propositions discussed.

RAGAN, C.

This is an appeal from a decree of the district court of Gage county, rendered July 17, 1891. The action was brought by the appellees, Kilpatrick Bros. & Collins, to foreclose a mechanic's lien against the property of the Kansas City & Beatrice Railroad Company (hereinafter called the "Beatrice Company") for a balance due for labor and material furnished in the grading of that company's rail-

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road. The appellant, The New York Security & Trust Company (hereinafter called the "Trust Company"), was made a party defendant, as it held a mortgage on the road of the Beatrice Company, given by it to secure an issue of \$400,000 of its negotiable bonds. The appellee, The Kansas City, Fort Scott & Memphis Railroad Company (hereinafter called the "Fort Scott Company"), was also made a party and filed its answer, claiming a lien for a balance due it for ties sold and delivered to the Beatrice Company, and used in the construction of its road. The appellee, The Kansas City, Wyandotte & Northwestern Railroad Company (hereinafter called the "Wyandotte Company"), was made a party defendant, as it was in the possession as lessee of the road of the Beatrice Company. By the decree of the district court Kilpatrick Bros. & Collins were given a lien upon the property in question for the sum of \$29,445.17; and the Fort Scott Company was given a lien for the sum of \$33,864.79. The two were declared first liens of equal rank and to prorate one with the other. The Trust Company, by the decree, was also given a lien on the property, subject to the first two liens, for the sum of \$278,267.85. The decree also provided that in case of default in the payment of these amounts within a time fixed, the property and franchises of the Beatrice Company should be sold and the proceeds of the sale applied to the satisfaction of the liens in the order of their priority. The Trust Company brings the case here and avers that the decree is erroneous, in the fact that its lien is postponed to those of the Kilpatrick Bros. & Collins and the Fort Scott Company.

It is conceded that the value of the property in controversy is insufficient to pay the amount of all the liens adjudged against it. The facts disclosed by the record before us, so far as they are deemed material, are these: That some time prior to the 29th day of May, 1889, the Wyandotte Company, a foreign corporation, had constructed a line of

railroad from Kansas City, Missouri, to the line between the state of Kansas and the state of Nebraska, at a point called Summerfield. For the prosecution of this undertaking, money had been furnished by the Philadelphia Investment Company (hereinafter called the "Investment Company"), a Pennsylvania corporation, having its place of business in the city of Philadelphia, in said state, upon terms and security which are not disclosed by the record, and which are immaterial except as showing that the Investment Company was familiar with the affairs of the Wyandotte Company, which shortly thereafter proved to be insolvent, and was, at the date of the negotiations hereinafter mentioned, financially unable to carry out an enterprise involving an outlay of considerable sums of money. Previous to this time, however, and during the progress of the construction of the road of the Wyandotte Company, and probably as a part of that undertaking, it was proposed to extend this line of road to Beatrice, Nebraska. At the time this project was first undertaken, it was supposed and intended that this extension would be made in the name and under the authority of the Wyandotte Company. Subsequently, however, pursuant to correspondence between one Erb, the president of the Wyandotte Company, and one Brockie, the president of the Investment Company, the plan was so changed as to require the formation of a Nebraska corporation, and accordingly a certificate of incorporation of the Beatrice Company was executed and recorded on the 19th day of June, 1889. On the first day of July, 1889, a mortgage was executed by the Beatrice Company upon all its property and franchises then existing, or thereafter to be acquired, purporting to be given to secure its negotiable bonds to the amount of \$400,000. This mortgage, which was filed for record on the 13th day of July, 1889, contained, among other things, the following:

"Whereas, the said party of the first part is the owner of a line of railroad constructed, and in process of construc-

tion, from a point on the line of the Kansas City, Wyandotte & Northwestern railroad where the same intersects the state line between Kansas and Nebraska, thence extending in a northerly direction through Pawnee county, state of Nebraska, to the city of Beatrice, in Gage county, in said state, all of said line of railroad being of the estimated length in the aggregate of thirty-five miles, or thereabouts; \* \* \*

“Whereas, for the purpose of building, furnishing, equipping, and operating said railroad, the party of the first part is desirous of borrowing money and has resolved to execute bonds of said company in amounts of \$500 each, as hereinafter stated: \* \* \* Upon the execution and delivery of this mortgage, and from time to time thereunder, the trustee shall, as requested by resolution of the board of directors of the railroad company, certify the bonds hereunder to the extent of and not exceeding \$400,000, and on said resolutions of said board of directors shall sell all bonds requested to be certified, and their proceeds shall actually be used for and applied, under the direction of said board, to the construction, completion, maintenance, and operation of said railroad, and not otherwise.”

On the 17th day of July, 1889, all these bonds were delivered to the Investment Company under an agreement as finally perfected, that the latter company should advance, from time to time, to the Wyandotte Company, or to Erb, as its president, money for the construction of the proposed Beatrice Company, upon the notes of the Beatrice Company, guarantied by the Wyandotte Company, for the payments of which these bonds should be held as collateral security. The entire amount of the capital stock of the Beatrice Company was subscribed by and issued to the Wyandotte Company; but it is evident that nothing was ever paid or intended to be paid therefor. During the earlier weeks of these negotiations, and until about the time of the execution of the bonds and mortgage, it had

not been decided whether a Nebraska corporation should be formed or not; nor if so, what should be its name; nor had the right of way been secured, or the route, or the Nebraska terminus of the road determined upon.

Elias Summerfield, the treasurer and general manager of the Wyandotte Company, testified on the trial as follows:

Q. Was there a note for this money?

A. Yes, sir.

Q. Who executed it?

A. It was first executed by the Kansas City & Northwestern road. Afterwards the attorney of the Trust Company suggested that it had better be changed, and returned the note to us to be executed by the Kansas City & Beatrice road, and indorsed by the Kansas City, Wyandotte & Northwestern road, and by the Northwestern Construction Company.

Q. When was that exchange made?

A. I can't tell you now. It was after the first note was signed, and we had gotten some of the money on it.

Q. Was it as late as October?

A. I can't remember. I possibly might find out at my office.

Q. But the original notes were made by the Kansas City, Wyandotte & Northwestern Railroad Company, and indorsed by the Construction Company?

A. Yes sir. We hadn't even incorporated the Kansas City & Beatrice road.

Q. It hadn't been incorporated?

A. No, sir; I think not, when the arrangement was made for the loan.

Q. The money was borrowed by the Kansas City, Wyandotte & Northwestern road, and placed in its treasury?

A. The exchange of notes was made before we got all the money. We might have got one payment, or the second, I can't tell which.

Q. Did you have a treasurer for the Kansas City & Beatrice road?

A. Yes, sir, a nominal one.

Q. But none of this money went into his hands?

A. No, sir.

Q. And these bonds of the Kansas City & Beatrice road were placed as collateral, after issued, to these notes?

A. Yes, sir.

Q. Do you know when the bonds were issued, as a matter of fact?

A. I think it was some time after we got the first issue, —the first \$65,000.

Q. After that?

A. Yes, sir.

Q. How long after?

A. I think some time after the latter part of July, 1889; I am not sure.

Q. At the time these first notes were executed, what, if anything, had been done by the Kansas City & Beatrice road towards the organization for the building of such road?

A. Nothing at all.

Q. Had the grade stakes been set?

A. No, sir; we had not even concluded on the final location at that time, nor even the name of the road.

Q. And the right of way had not been procured?

A. No, sir.

Q. So that nothing, in fact, had been done at the time you executed these first notes and got the first money?

A. I think not. Of course we had made preliminary surveys.

Q. But had not established your lines?

A. We had not done anything until the 8th day of August, 1889, the date of the vote for municipal bonds was had at Beatrice. If we hadn't gotten the bonds we would not have built. We intended going to Wymore. \* \* \*

Q. Are you able to state approximately the amount of actual cash you received from the Philadelphia Investment

Company or from the Wyandotte & Northwestern Company?

A. I think something about \$250,000. There was about three per cent commission paid for the loan.

Q. Money was constantly taken out for interest on these notes from month to month?

A. No, sir, they were not due. The road went into the hands of a receiver before the notes became due, I think; that is my impression. We might have made one payment of interest, I am not sure—I expect we did; I think we paid the interest on the six months installment; I have forgotten about that.

It was estimated that the proposed construction would cost \$350,000. Of this sum \$260,000 was to be furnished by the Investment Company upon the notes of the Wyandotte Company, afterwards changed to the notes of the Beatrice Company, guarantied by the Wyandotte Company, and collaterally secured by the bonds of the Beatrice Company, to the amount of \$400,000, secured by a mortgage on its anticipated property. These bonds, when executed, were to be placed in the possession of the Investment Company. Sixty-five thousand dollars of the cost of the proposed road was expected to be realized from municipal donations, and any deficiency was to be made up from the treasury of the Wyandotte Company. The success of the enterprise depended upon the co-operation of the Investment Company, and its officers and attorneys were consulted at every step in the organization and progress of the enterprise. Pursuant to this arrangement money was furnished from time to time by the Investment Company to Erb and his associates, which it was intended by the Investment Company should be used in the building of the road. However, the Investment Company does not know how much thereof was in fact so employed, nor how much, if any, was diverted to other purposes. Erb and his associates proceeded to make contracts, as officers of and in the name of

the Beatrice Company, for work and material for the construction of the road of that corporation, and, among others, entered into a contract with Kilpatrick Bros. & Collins for grading, and with the Fort Scott Company for ties. The parties thus contracted with fulfilled their respective obligations, performing the labor and furnishing the material contemplated, until the 8th day of January, 1890, when the same was completed. For the balance remaining unpaid on both their accounts notice of liens against the property of the Beatrice Company was duly filed. It is not denied that all of the bonds, together with the notes for which they were deposited as collateral, remain in the possession of the Investment Company.

The important and controlling question in this case is whether the liens of the men who furnished the material and labor that entered into the construction of this railroad are superior to the lien of this mortgage made thereon before the road had any existence, except on paper, and made for the benefit of the Investment Company, which knew, at the time of its execution, that the property which it purported to cover had in fact no existence. The statute relative to mechanics', material-men's, and contractors' liens upon property of this character is found in chapter 54, article 2, Compiled Statutes, 1893, sections 2 and 3 of which are as follows:

“Sec. 2. And when material shall have been furnished, or labor performed, in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and material-man, contractor or subcontractor, shall have a lien therefor, and the said lien therefor shall extend and attach to the erections, excavations, embankments, bridges, road-bed, and all land upon which the same may be situated, including the rolling stock thereto appertaining and belonging, all of which, including the right of way, shall constitute the excavation, erection or improvement provided for and mentioned in this act.

“Sec. 3. Every person, whether contractor or subcontractor, or laborer or material-man, who wishes to avail himself of the provisions of the foregoing section shall file with the clerk of the county in which the building, erection, excavation, or other similar improvement to be charged with the lien is situated, a just and true statement or account of the demand due him after allowing all credits, setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien and verified by affidavit; such verified statement or account must be filed by a principal contractor within ninety days, and by a subcontractor within sixty days, from the date on which the last of the material shall have been furnished, or the last of the labor is performed; but a failure or omission to file the same within the periods last aforesaid shall not defeat the lien, except against purchasers or incumbrances in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claims for the lien was filed.”

It is urged that this statute is not unlike other enactments of the same general character, in that it entitles the contractor, laborer, or material-man to a lien only upon the interest of the party or parties at whose instance the work may be done or material furnished; and that, therefore, if at the time the work of the construction or reparation is begun the property is subject to existing liens shown on the public records, such liens will be entitled to precedence over any claim that may be asserted for labor or material furnished for improvements on the property after the date of the filing of said liens; and it is argued, therefore, that the appellant is entitled to a first lien upon the property in question for the amount of the advances made by the Investment Company to Erb and his associates, because the mortgage of the Beatrice Company was executed and filed for record at a date prior to that at which the

contracts for labor and material were entered into. To sustain this contention the learned counsel for the appellant cite many authorities. Of the authorities so cited, the one most relied upon, perhaps, is *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S., 296, in which it is said: "A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction." It appears from the reported opinion in this case that January 17, 1880, the railroad company executed a mortgage on this property to the Central Trust Company of New York to secure the payment of \$1,250,000 of six per cent bonds. The mortgage was to cover all the property then owned or that might thereafter be acquired by the railroad company. The trust company accepted the trust created by the mortgage and the railroad company issued its bonds. They were certified by the trust company and sold on the market. On March 20, 1883, Hamilton entered into a contract with the company, under and by which he furnished material and erected for the company a dock on the Maumee river, and having received only a partial payment, he filed a claim for a mechanic's lien for the balance due him. The land on which the dock was built was a part of the railroad and covered by the mortgage made to the Central Trust Company. Brewer, justice, speaking for the supreme court of the United states, said: "It will be noticed, and it is a fact which lies at the foundation of this case, that the contracts for the construction of the dock were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton and to all others of the fact and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can, three years after creating by a recorded

mortgage an express lien upon its property, by contract with a third party, displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate no one would have the hardihood to contend that it could be done, and there is in this respect no difference between ordinary real estate and railroad property. A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction."

By the judgment of the court pronounced in that case Hamilton's lien was held to be subject to the lien of the mortgage executed by the railroad company in January, 1880. But in that case the railroad company had a real franchise. It owned, and had owned for some time, the lands upon which the docks were built. The mortgage had been of record on a railroad in existence for some years prior to the performance of this work by Hamilton.

In our opinion, the principles of law announced by the supreme court of the United States in that case are inapplicable to the facts disclosed by the record in the case we have under consideration. When the mortgage of the Beatrice Company was executed, that company had, at most, but a nominal existence and nothing whatever upon which a mortgage or other conveyance could operate. Property or property rights it did not have; but it is said that it had a franchise, and that this could be mortgaged, and that the mortgaging of it, together with the after-acquired property, drew with it the subsequently constructed road and appurtenances. How can it be said with any degree of accuracy that the Beatrice Company, at the time of the execution of this mortgage, was possessed of a franchise? At that time nothing had been done, or certainly determined upon, in its

behalf, excepting the mere execution and filing of its certificate of incorporation. No map of its proposed line of road had been filed or prepared. No right of way had been procured, nor steps been taken towards its acquisition; nor had the proposed route or Nebraska terminus of the road been determined upon, further than if the road should be built at all, which was a matter still in abeyance and dependent upon certain contingencies, it would extend through and into certain counties. It is quite certain at least, prior to the location of the line of the proposed road and the procurement of its right of way, either actually or by the beginning of proceedings therefor, under the statutory enactments for such purposes, any other five persons might have filed a like certificate of incorporation, and if possessed of the inclination and necessary pecuniary ability, might have constructed, maintained, and operated the very line of road now in controversy.

A franchise which not only imposes upon its possessor no obligation, but confers upon him no right or privilege not enjoyed by every other person, is so singular as to defy classification. Mankind are prone to mistake words for things, and are often pardonable for the fault; but it is difficult to form a sufficient excuse when there is nothing in existence for which the word is in any sense descriptive. Be that as it may, it is evident from the facts disclosed in this record that the Beatrice Company never had, or was intended to have, either by the Investment Company or by Erb and his associates, any beneficial interest in or control over its franchise or property, at least not until after the building and equipment of the line. The controlling motive and intent of the parties, and the sole purpose from the inception of the scheme, was not that the Beatrice Company should build the road, borrowing such sums as in addition to its own means should be necessary, but that the Investment Company should construct the road through the instrumentality of the Wyandotte Company and Erb

and his associates, as its agents, retain at all times, by means of the bonds and mortgage, the practical possession and control of its franchise, property, and revenues. Doubtless, it was hoped by the Beatrice stockholders and incorporators that something would be realized in the way of dividends, or otherwise, over and above what would be required for the satisfaction of the principal and interest of the advances made by the Investment Company; and this sum, whether great or small, would accrue to them upon the sale of the Beatrice road, or otherwise, as a compensation for their participation in the undertaking. But they embarked nothing in the venture, and cannot, with any propriety, be said to have had any interest in its success, except the contingent and speculative one just mentioned. Practically, the Investment Company undertook to construct the railroad of the Beatrice Company, furnishing the requisite means therefor, and employing Erb and his associates, as its agents, to effect a technical organization, procure such municipal donations as were obtainable, look after and make the requisite contracts for the procurement of the material and construction of the road; see to the disbursement of the money, they assuming no personal obligation or responsibility in the matter, and accepting as compensation for their services such profits, if any, as should be realized out of the speculation. To regard such a transaction in the same light as that of the erection of a building by a mortgagor upon mortgaged lands for which he retains the title, is, it seems to us, false reasoning.

It is urged with much force by counsel for the appellant that the record of the mortgage was constructive notice to persons dealing with the railroad, of the rights of the mortgagee. True, but that is the extent of its effect. The recording of the mortgage created no rights or obligations. Under the circumstances of this case, the facts that the bonds which the mortgage purported to secure were negotiable is of no significance. The rights of the parties and

the legal effect of the transaction would be precisely the same had no such bonds been executed or contemplated, and had the mortgage recited at length the transactions and agreements between the Investment Company and Erb and his associates, and simply pledged the proposed road and franchise to the Investment Company as security for its advances for the construction of the road. Had the mortgage contained such a recital, no one would doubt, it seems to us, that the Investment Company was the real promoter and builder of this road, and that Erb and his associates, and the officers of the Beatrice Company were in reality, though not nominally, the Investment Company's agents, and that the contracts and obligations incurred by them, even in their own names, in and about the construction of this road, would be binding upon the Investment Company.

It is admitted by counsel for the appellant that if the bonds had remained in the hands of Erb or the Wyandotte Company into whose possession they first came, the mortgage would not have been entitled to priority over the mechanic's lien claimants, and we are unable to see that anything subsequently occurred which improves the status of these bonds. What recourse or remedy, if any, the lien holders would have had if the bonds had been sold to innocent purchasers, or whether prior to the completion of the road and filing of the liens there could have been any such purchasers, we are not called upon to determine.

Another case relied upon by counsel for the appellant is *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S., 649. The syllabus of that case is as follows: "In this case unsecured floating debts, due by a railroad company for construction, were, in the absence of a statutory provision, held not to be a lien on the railroad superior to the lien of a valid mortgage on it, duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value." It will be seen from an examination of the opinion in that

case that it differs from the one at bar in many important particulars. There the railroad company, at the time of the execution of the mortgage, owned; not only its franchises, but the road-bed and right of way and township aid voted for the construction of the road; and the bonds which the mortgage was intended to secure were delivered by the railroad company to one Crawford in consideration of his agreement to construct the road, and he, and not the company, negotiated and pledged the bonds for money with which to perform his contract; and the lien claimants contracted, not with the railroad company, but with Crawford, with actual knowledge of the existence of the mortgage and of the consideration upon which the bonds were delivered to Crawford, and of the fact that they were negotiated by him, and that the proceeds belonged to him and were being expended in the fulfillment of his contract. Of course the fact that the parties to whom he sold the bonds took precautions to have the proceeds actually expended in the construction, could not have the effect, equitably or otherwise, to postpone the lien of the mortgagee to that of the other persons, who, with full knowledge of all the circumstances, were selling Crawford material for use under his contract, for the railroad company, for the procurement of which, on his part, he had been paid by the very securities which they sought to have deferred for their benefit.

A case very much like the one at bar is the *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 26 N. E. Rep. [Ind.], 784, where it is said: "The remaining question may be thus stated: Is the lien of the appellant's mortgage superior to the liens of the appellees? In order to intelligently discuss this question it is necessary to state the material facts out of which it arises. Those facts may be thus summarized: On the 28th day of May, 1888, the railway company entered into a contract with the Burns Construction Company to build and equip its road. Burns

was the president of the railway company, and also the general manager of the construction company. On the 28th of August, 1888, the railway company ordered the execution of a trust deed, and the instrument was written and signed in duplicate. One of the duplicates was delivered by Burns to the Farmers Loan & Trust Company on the 18th day of October, 1888. The other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company that executed the mortgage; but from time to time bonds were delivered to Burns upon estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to William Dallin, and sixty-six were transferred to John Fitzgerald, a subcontractor. The remainder of the bonds, three hundred and sixty-four in number, were hypothecated by the Burns Construction Company, but when, where, to whom, or for how much, is not shown. In considering the question of priority, one of the important things to be kept in mind is that the mortgage was executed upon property that had, in fact, no existence, for the railroad mortgaged had not been built. That there is a material difference between a case such as this, where the railroad had not been built, and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter. As held in *Brooks v. Railway Co.*, 101 U. S., 443, parties must in such a case as this be deemed to have contracted with reference to the existing condition of things so far as they were open to observation. The mortgagee must have known that its security was valueless as long as there was no road in existence, and it must have known also that labor, material, and money would be required to build the road. It was bound to know, too, what the law was, for 'it entered into and became a part of their contract.' This general rule has been repeatedly declared and enforced by this court. The principle we are discussing was ap-

plied to the case of a lien asserted by a miner, and it was held that the lien was superior to a mortgage. But the present case is much stronger than the one referred to, for here there was in fact no property in existence when the mortgage was made. The property upon which the mortgage finally fastened was created by the labor, materials, and the money of the appellees. We are strongly inclined to doubt whether the mortgage lien would be paramount even if the bonds which the mortgage was executed to secure had been delivered before any notices of liens were filed. Very strongly reasoned decisions declare that the liens of the mechanics are superior to the lien of the mortgage in cases where the mortgage is executed before the construction of the railroad. (*Neilson v. Iowa E. R. Co.*, 44 Ia., 71; *Equitable Life Ins. Co. v. Slye*, 45 Ia., 615) We need not, however, decide this question, but it is proper to say that as the labor, materials, and money of the appellees gave all there is of value to the property claimed under the mortgage, the mortgagee ought to show a clear and strong superior right in order to defeat the claims of those who, in reality, brought the property into existence. The doubt in our minds is whether the mortgagee's lien can, in any event, be justly held to be the prior one. We have no doubt that if the mortgagee can succeed at all it must be because it is shown clearly and strongly that the mortgagee is a *bona fide* purchaser. In our judgment the appellant has shown no such right as entitles it to the paramount lien. It is true that the trust deed or mortgage was placed in the hands of the mortgagee or trustee before some of the notices were filed, but the instrument securing the bond was a mere shadow; for had no bonds ever been delivered to *bona fide* holders the instrument would never have been effective against these lien holders. We are far within the authorities in asserting this, as they carry the doctrine much further.      \*      \*      \*

“The delivery of the mortgage or trust deed alone did

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not destroy the priority of the liens of the appellees, for the delivery of such an instrument cannot of itself defeat equitable or legal claims, since it is essential that one who asserts a right against a legal or equitable claim should show that he parted with value before notice of such equitable or legal right. (*Anderson v. Hubble*, 93 Ind., 570, and cases cited; *Hunsinger v. Hofer*, 110 Ind., 390, 11 N. E. Rep., 463.) This is the rule in ordinary cases, and certainly it must govern a case like this, where the mortgagee seeks to defeat the claims of those whose labor, materials, and money created the property which it is sought to subject to the lien of the mortgage. The mortgagee must succeed, if at all, as a *bona fide* holder of bonds executed under the mortgage. It cannot, as against the claims of the laborers, mechanics, and material-men, be deemed a *bona fide* holder unless it affirmatively shows that it paid value for the bonds before notice of the liens. The rule in analogous cases is well settled in this state, and the strong equities of the appellees call for its liberal application in this instance.

\* \* \* There is reason for saying that it was the duty of the party buying the bonds to ascertain whether a lien had been placed on the property prior to the time of its acquisition of those instruments, but we do not go as far as that in this case. \* \* \* We are not here seeking a general rule that shall apply to every case resembling the present, nor do we attempt to lay down any such rule. We simply adjudge that in such a case as this the mortgagee cannot prevail over laborers and material-men without showing that it is a *bona fide* holder of the principal debt in all that the term '*bona fide* holder' implies. It cannot, in a case like this, where there was no railroad in existence when the mortgage was delivered, be deemed a *bona fide* holder as against laborers, mechanics, and material-men without showing that before notice of the acquisition of the liens under the statute a fair value was paid for the bonds."

We concur in both the reasoning and the conclusion of the foregoing opinion. It is not to be denied that the supreme court of the United States distinguishes between the rolling stock and chattels of a railroad company, which it characterizes as "loose property susceptible of separate ownership and separate liens," and the road-bed, station houses, tracks, etc., and upon this distinction holds that while the doctrine as to the after-acquired property applies to the former it does not apply to the latter. The basis of this distinction is the doctrine relative to fixtures to real property. It is not denied that if one owns real estate which is subject to a valid mortgage or other lien, and another sells him personal property which he permits to be affixed to or incorporated into the real estate, he, by so doing, waives any right he might otherwise have to claim a lien for the purchase price superior to the prior mortgage; and this arises out of the necessity of the case, because, otherwise, the mortgagee might be deprived of his security by the depreciation of values or by extravagant or exorbitant improvements without his knowledge or consent. But how can this be the case when a mortgage is made and the money advanced upon it for the sole purpose of bringing into existence the entire property upon which the mortgage is intended to rest? The case at bar is a good illustration. The Investment Company knew that its bonds and mortgage were, and would remain, of no value unless the railroad should be constructed; it knew that in order that such a road should be constructed that material and labor were indispensable, and that the Nebraska statute guaranties a lien to those who should furnish them. The Investment Company made Erb and the Wyandotte Company its agents for the purposes of this construction, and it owed the duty to persons furnishing material and labor in the building of this railroad to see that the money advanced was applied to the payment of their claims.

Another point made by the appellant is that Kilpatrick Bros. & Collins, by their conduct, have waived their rights to a lien. It appears that after the completion of the work, one Strohm, who was their accountant and book-keeper, together with Erb, the president of both railroad companies, made a computation and agreement as to the amount remaining unpaid under the contract, and received from the latter accepted drafts upon the Wyandotte Company for that amount; but he testified, without contradiction, that it was expressly agreed that these drafts were not taken or to be considered as payment, but only as collateral security therefor, and as constituting a record of the computation and accord; and that there was no agreement for the relinquishment of any existing or prior obligation in favor of his principals, and that no such release was intended by him, nor, so far as he was aware, by Erb. We do not think that the mere receipt of the drafts under such circumstances amounted to a waiver, which, in the absence of an express agreement, will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his own conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended, or consented to; and it is not claimed that such was the case here.

In *Farlow v. Ellis*, 15 Gray [Mass.], 229, it is said: "Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage which, but for such waiver, he [the party relinquishing] would have enjoyed. It may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still, voluntary choice not to claim is of the essence of waiver, and not mere negligence."

In Jones, Liens, sec. 1011, it is said: "The mere taking

of security for the amount of a debt for which a lien is claimed does not ordinarily destroy the lien. To have this effect there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien and destructive of it."

"Sec. 1013. The taking of a mortgage upon the same property upon which the creditor claims a statutory lien, may not displace the lien. The mortgage is regarded as a cumulative security, and the creditor may enforce either the lien or the mortgage. So also the taking of the collateral obligation of another person for the payment of the lien debt does not ordinarily debar the lien-holder from claiming the security of his lien, unless the circumstances are such that an intention to waive the lien may be reasonably inferred." (*Payne v. Wilson*, 74 N. Y., 348).

The appellant pleaded, by way of cross-petition to the claim of the Fort Scott Company, that the latter had intervened in an action still pending in the United States circuit court for this district, concerning the same matter, and that that court, by an interlocutory decree, had adjudged the lien of the intervenor to be superior to that of appellant. An interlocutory order or finding in a pending suit in equity in a federal court is not a final determination of the rights of the parties, but one which may be modified or discharged at any time before the enrollment of the final decree. (*Ayres v. Carver*, 17 How. [U. S.], 592; *Thomas v. Wooldridge*, 23 Wall. [U. S.], 283; *Forgay v. Conrad*, 6 How. [U. S.], 201; *Ex parte Jordan*, 94 U. S., 248.) This order, therefore, did not merge the claim of the Fort Scott Company, and was not a bar to the litigation of the same matters in the state court. The mere pendency in the courts of another jurisdiction of an action between the same parties, and concerning the same subject-matter, cannot be successfully pleaded in bar or abatement. (*Gordon v. Gilfoil*, 99 U. S., 168; *Sharon v. Hill*, 22 Fed. Rep., 28; *Stanton v. Embrey*, 93 U. S., 548, and authorities there

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cited.) A demurrer to this answer was therefore properly sustained.

The foregoing conclusions we regard as decisive of the case and as rendering unnecessary the determination of other questions, some of them important and far-reaching, which are discussed in the briefs. The judgment of the district court is therefore in all things

**AFFIRMED.**

POST, J., dissenting.

I am unable to concur in the conclusions of the majority of the court in this case. In my judgment the law is correctly stated in the following opinion submitted by Commissioner IRVINE, in which Commissioner RYAN concurs:

IRVINE, C.

With most of the conclusions stated in the opinion of the court the writer concurs. He has been unable, however, to reach the same conclusion as to the priority between the mortgage and construction liens. In his view this question must be determined upon principles somewhat different from those upon which the majority opinion is based, and in order that the writer's views may be properly understood it will be necessary to discuss not only the grounds upon which the majority opinion is based, but also other questions arising in argument.

In the first place it is to be observed that our statutes expressly permit railroad companies to mortgage their property and franchises for the purpose of securing money borrowed by them for the construction and equipment of their roads. (Comp. Stats., ch. 16, sec. 117.) And it is also provided that such mortgages may by their terms include and cover not only the property of the companies making them at the time of their date, but property, both real and personal, which may thereafter be acquired by them. (Comp. Stats., ch. 16, sec. 119.)

In the next place the legislature has provided for liens upon railroads to secure laborers and material-men for labor performed and material furnished for the construction, repair, or equipment of such railroads. This lien is created by an act somewhat similar to the general mechanic's lien law, but passed at a different time, and as a distinct act, and differing in many of its particulars from the general law creating mechanics' liens. These liens are wholly the creatures of statute, and depend upon the statute for their existence, extent, and construction. While the statute does not in express terms fix the time when such liens shall be deemed to accrue, the law is so far analogous to the general mechanics' lien law that it is almost a necessary conclusion that the construction placed upon that law should apply to this, to-wit, that the lien attaches from the time labor is begun, or the first material furnished; but as between two or more lienors upon the same improvement there is no priority, unless it be where intervening rights of third persons require a different rule.

A further general observation may be made. A railroad is an entity. Its whole line, including right of way, road-bed, stations, shops, equipment, and all property necessary for the effective operation of the road, in its entirety, constitutes a single property, which cannot, in the absence of statute or of peculiar equities of a very controlling character, be dismembered by selling different portions separately. This general doctrine or policy is too well settled by the uniform current of authorities to permit any extended discussion. The mortgage here in question and the liens must be treated as co-extensive in regard to the property upon which they operate, unless a separation of this property is practicable and required by the equities of the case. Applying the ordinary rule governing the priorities of such incumbrances, the lien of the mortgage would take effect upon the date of its record, July 13, 1889, while the construction liens would not attach until August

20. It is claimed, however, that under the facts of this case the mortgage should be subordinated to the construction liens. The principal ground upon which this contention is based is that a mortgage upon after-acquired property attaches to such property only to the extent of the mortgagor's interest therein, and subject to any liens existing thereon at the time of its acquisition by the mortgagor. This principle is equitable, and is established by the authorities, but is subject to a broader law, that existing liens cannot be displaced in its application. The cases upon this subject appear at first inspection to be somewhat in conflict, but a close inspection of the leading cases establishes a real harmony in the decisions.

In *Galveston R. Co. v. Cowdrey*, 11 Wall. [U. S.], 459, there were several mortgages upon the same railroad, the last in point of time being given to secure a debt for rails used in the construction of the road. It was there held that this mortgage was junior to those which had priority of time. It was held that the junior mortgagee occupied the position of an assignee of the mortgagor, and that by allowing his property to go into the road he had consented that the senior mortgages should attach, to his exclusion. The impracticability of dismembering the railroad and selling its different parts was also emphasized, and so was the fact that the property acquired through purchase from the junior mortgagee had become a part of the real estate and subject to all existing liens thereon.

In *United States v. New Orleans R. Co.*, 12 Wall. [U. S.], 362, the railroad company had purchased certain rolling stock, the vendor in the contract of purchase retaining a lien thereon for the purchase money. It was there held that a blanket mortgage, in existence at the time the rolling stock was purchased, attached to the rolling stock in the condition in which it came into the mortgagor's hands, and only to such interest as the mortgagor acquired, and that, therefore, the lien of the vendor of the

rolling stock was superior to the lien of the mortgage upon the rolling stock alone. This seems to be the case where the doctrine contended for by the appellees was first applied, and in this case the court said: "Had the property sold by the government to the railroad company been rails as in the case of *Galveston R. Co. v. Cowdrey*, or any other material which became affixed to and a part of the principal thing, the result would have been different; but being loose property, susceptible of separate ownership and separate liens, such liens, if binding upon the railroad company itself, are unaffected by a prior general mortgage by the company and paramount thereto." In *Fosdick v. Schall*, 99 U. S., 235, and in *Fosdick v. Car Co.*, 99 U. S., 256, the doctrine of *United States v. New Orleans R. Co.* was reaffirmed in regard to rolling stock sold to the mortgagor under a contract of conditional sale, and in *Fosdick v. Schall* a portion of the language just quoted from the New Orleans case was repeated.

The case of *Brooks v. Burlington & S. W. R. Co.*, 101 U. S., 443, was decided upon the statutes of Iowa, which in terms allow to mechanics a lien upon the building, erection, or improvement prior to that of a pre-existing mortgage upon the land. Our statutes are not in this respect similar to those of Iowa. The distinction will be hereafter referred to.

*Myer v. Car Co.*, 102 U. S., 1, was another case of a conditional sale of cars, and reaffirmed *Fosdick v. Schall*.

In *Thompson v. White Water Valley R. Co.*, 132 U. S., 68, a mortgage covering after-acquired property was held superior to the liens of persons furnishing money for the construction of a portion of the road upon the profits of that portion, the portion constructed being within the original charter of the railroad.

*Williamson v. New Jersey S. R. Co.*, 28 N. J. Eq., 277, and the same case on appeal, 29 N. J. Eq., 311, is much relied upon by appellees. In that case certain

docks were constructed for the Long Branch & Seashore Railroad Company, and the lien claim was filed against the New Jersey Southern company as builder, and the Seashore road as owner. The Southern company seems to have owned a controlling interest in the stock of the Seashore company, but there had been no consolidation of the roads, nor any formal purchase or conveyance. The lien for the construction of the docks was held to be superior to a blanket mortgage given by the New Jersey Southern company, and this priority was established upon the ground that the mortgage of the Southern company attached to the whole of the property of the Seashore company, subject to existing liens. It is plainly intimated that had the work been done for the Southern company upon land then owned by it, the decision would have been different.

In *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn., 454, the lien was for the construction of a depot upon land whose owner agreed to give it to the company, provided that it would build a depot thereon. No conveyance was in fact made, and the lien for construction was held superior to a blanket mortgage upon the railroad, because the legal title had never vested in the railroad and the equitable title did not vest in it until the depot was completed and after the lien attached.

In *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 127 Ind., 250, the court expresses a grave doubt as to whether under the law of Indiana a mortgage can be made to attach to after-acquired property in any event, and the authority of the case upon this question is weakened by the existence of that doubt. Moreover, the court disclaims any attempt to lay down a general rule, but holds that under the special facts of that case the construction lien was superior to the mortgage, and the court was undoubtedly right in its conclusion. The bonds, to secure which the mortgage was given, were issued to a construction company, and the court held that this construction company

could not set up the bonds, given to it under these circumstances, as superior to the liens of material-men for debts which the construction company itself owed them. It appeared that the construction company had hypothecated a portion of the bonds, but when, where, and to whom these bonds had been pledged did not appear, and the court could not in that litigation consider the rights of the pledgees.

Perhaps the best elucidation of the whole question is found in the case of *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S., 296, where Mr. Justice Brewer reviews the authorities and holds that a blanket mortgage creates a lien whose priority cannot be displaced by a contract between the company and a third party for the erection of buildings or other works of original construction. In this case the lien was for the construction of a dock upon land of which the mortgagor was the equitable owner, and the case was distinguished from the case of *Botsford v. Railroad Co.* upon that ground.

In the *Farmers Loan & Trust Co. v. Kansas City, W. & N. R. Co.*, 53 Fed. Rep., 182, Judge Caldwell in an exceedingly lucid, vigorous, and learned opinion discusses the relative equities of such mortgages and liens, but (so far as the case is analogous to this) upon the basis of what the law ought to be rather than what it has heretofore been declared to be, and gives priority to certain liens as against a mortgagee of the railroad because of conditions imposed upon the mortgagee in the appointment of a receiver at its instance, the conditions receiving the assent of the mortgagee. While we are not disposed to question the correctness of the abstract opinions expressed by Judge Caldwell, nor of his determination of the law as applied to that case, his conclusions are not applicable to this case, where the mortgagee stands upon its vested rights and has not consented to any displacement of its lien nor asked the court for any relief authorizing the court to impose upon it similar conditions.

Other cases might be cited, but the general principles applicable are well illustrated by those referred to, and we do not think that any well considered case can be found in opposition to these principles, which may be briefly stated as follows:

A mortgage covering after-acquired property attaches to such property as it is acquired by the mortgagor. Where such property remains separable and susceptible of separate ownership, the mortgage only attaches to the interest of the mortgagor therein, and does not displace existing liens thereon. Where, however, the after-acquired property becomes inseparably a portion of the real estate to which the mortgage has attached, the mortgage extends to such property, as in the familiar case of a house erected upon a lot burdened by a mortgage. In that case, no one would now have the hardihood, under our statute, to claim that liens for the construction of the house should displace the mortgage, in the absence of special circumstances operating by way of estoppel.

In this case substantially the whole of the right of way had been acquired by the Beatrice road before any work was done by the Kilpatricks, or any ties furnished by the Fort Scott road. The statute gives power to railroad companies to mortgage the whole or any part of their property and franchises, and such mortgage is made binding upon the lands, roads, or other property of the railroad company mentioned in such mortgage. (Comp. Stats., ch. 16, secs. 117 and 118.) This mortgage expressly described the right of way as a part of the property mortgaged. This right of way was real estate to which the mortgage attached the instant it was acquired by the Beatrice road. The work performed and the materials furnished by the lienors were distinctly improvements upon the real estate and inseparable therefrom; in the language of the supreme court of the United States, "not susceptible of separate ownership or separate liens." To give the lienors priority would

compel us to displace the priority of a mortgage existing upon the real property at the time the liens accrued. This is something which we do not think any court has the right to do.

But the appellees contend that, notwithstanding the principles just stated, they cannot be urged in support of this mortgage, because the bonds, to secure which the mortgage was given, were not in the hands of *bona fide* holders for value. We can see no force in this contention. In one sense it might be said that the Investment Company does not occupy the position of a *bona fide* holder; that is, it took the bonds with full knowledge of the facts. It knew that the railroad had not been constructed; it was bound to know that under the law persons furnishing material or performing labor in the construction of the road might become entitled to liens thereon; and if the rights of the bond holders depended upon their ignorance, at the time of receiving the bonds, of outstanding equities in favor of third persons, they certainly could not be considered *bona fide* holders without notice. But their rights do not depend upon their establishment of such ignorance. The Investment Company is a holder for value. It has advanced the whole loan of two hundred and sixty thousand dollars, and we take it that no one will question the doctrine that a pledgee of such securities is a holder for value to the extent of the indebtedness for which they stand pledged. The case of *Farmers Loan & Trust Co. v. Canada & St. L. R. Co.*, 127 Ind., 250, is not opposed to this view. The pledgees in that case were not protected, because, in the language of the court, there was no evidence as to "when, where, or to whom these bonds had been pledged." The Investment Company advancing its money in good faith and promptly recording its mortgage had a right to rely upon its priority in time, and the lienors, by the record of that mortgage, were notified of the existence of its lien, and entered into their contracts and into their

performance with such notice. Many of the cases in the supreme court of the United States heretofore cited support this view. (See, too, on this point *Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207.)

It is argued at great length that the peculiar provisions of section 3 of the act providing for construction liens on railroads, Comp. Stats., ch. 54, art. 2, subject the mortgage to the liens. This section requires for the perfecting of the lien the filing with the proper county clerk of a statement of account setting forth the time when the material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by affidavit. It is further provided that this statement must be filed by a principal contractor within ninety days from the date on which the last material shall have been furnished, or the last of the labor performed, and continues as follows: "But a failure or omission to file the same within the periods last aforesaid shall not defeat the lien except against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed." The construction that the appellees place upon this language is that the only liens which can under any circumstances be superior to the construction liens are those which accrue during such default in the filing of claims, and without notice of the claims. It is quite clear that this construction is not correct. The object of the section referred to is principally to provide for the perfecting of the lien by filing a verified claim, and the proviso is inserted with reference to this objection alone. Prior incumbrancers cannot be affected by the lien at all, much less by a failure to perfect it within time; but for the protection of *bona fide* creditors, whose claims accrue after a default in filing the claim, this proviso is inserted, defeating the lien so in default where necessary to protect such creditors. The language has no reference to incum-

brances prior in time to such liens. To give the section the construction contended for would be to nullify the whole policy of our statutes in regard to recording and the priority of incumbrances, and would conflict with the spirit at least of section 120 of chapter 16, Compiled Statutes, providing that the recording of a railroad mortgage shall be notice to all the world of the rights of all parties under the same.

This point has been much discussed on behalf of some of the appellees and also by counsel interested in a similar question, who, by leave of the court, have filed a brief. Attention is called by all of counsel who argue this question to the similarity existing between the Iowa statutes and our own, but the arguments made differ widely. In one brief it is argued that the similarity of the statutes makes the Iowa decisions closely in point, if not controlling, and that the Iowa decisions favor the priority of the construction liens. But counsel in another brief argue the question upon general principles as to the construction of statutes, reach the same conclusion, but contend that the differences in the statutes render the Iowa decisions inapplicable. The similarities which exist warrant the inference that our law was largely taken from that of Iowa, and were the statutes in all points essentially similar we should feel bound to give our law the construction placed upon the Iowa law by the courts of that state before ours was adopted; but the statutes differ in at least one very important feature, and the decisions do not support the contention of the appellees.

Section 3 of our law, relating to the filing of a claim of lien and the effect of the failure to file the same within the time provided, is similar to section 6 of the Iowa law. Section 9 of the Iowa law, however, contains provisions establishing the position of liens in respect to other incumbrances. One of these provisions is the following: "The liens for the things aforesaid or the work, including

those for additions, repairs, and betterments, shall attach to the buildings, erections, or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which said erection, building, or improvement belongs is erected or put." There is no such provision in our statute. It was because of that provision or a similar one, of which that is amendatory, that the supreme court of the United States in *Brooks v. Railroad Co.*, *supra*, held the construction liens paramount to the mortgage. In all the Iowa cases where such liens have been held prior to existing mortgages the decision has been based upon section 9. In all the cases wherein section 6 has been construed the question was not between construction liens and prior mortgages, but between construction liens and subsequent mortgages; and the course of decisions has been exactly in accordance with the construction which we have above placed upon section 3 of our law. The case of the *National Lumber Co. v. Bowman*, 42 N. W. Rep. [Ia.], 557, clearly states the combined effect of these two sections, and shows that in the absence of section 9 the superiority of a mortgage prior in time to the construction liens could not be denied.

It is also urged that the bonds are void, or at least non-negotiable, as not conforming with that portion of section 117, chapter 16, Compiled Statutes, which authorizes railroad companies to "issue their corporate bonds, \* \* \* secured by said mortgages or deeds of trust, \* \* \* convertible into stock or not, as shall be plainly expressed on the face of each and every bond so issued by said company." These bonds are on their face an absolute obligation for the payment of money. Their language in this respect is as follows: "Promises to pay in gold coin of the United States of America of the present standard, weight, and fineness, or at the option of the holder, in sterling money at the fixed rate of 49½ pence per dollar." The objection made is that this bond fails to express on its face whether or not

it is convertible into stock. We construe the statute as requiring that if the bonds be convertible into stock, such fact shall be plainly expressed on their face. A more distinct and absolute obligation to pay money alone could not be expressed than is expressed on the face of the bonds in question.

Another contention is that the mortgage is in excess of the power conferred upon the corporation, in that the authority to execute mortgages is confined to roads which already have some portion of their line constructed. This contention is based upon the clause in section 120, already referred to, requiring such mortgages to be recorded in each organized county "through which said road mortgaged or deeded may run in this state." The construction given to this language is too narrow. The word "run" in the statute is an unfortunately inexact term, but its meaning is reasonably clear, and the language taken in connection with the rest of the statute requires that it should be given a future as well as a present construction. In other words, that the word "may" should be construed in the sense of "shall hereafter." No other construction is reasonable.

A further argument urged to sustain the position that the bonds are void is based upon the allegation that their amount is in excess of the maximum indebtedness permitted by law. It is claimed in argument that no lawful stock was issued by the Beatrice Company, or if any was issued, that its amount was not sufficient to sustain the indebtedness created, or attempted to be created, by the bonds. Whether or not evidences of indebtedness of a corporation beyond the limit permitted by law are absolutely void, as the appellees contend, need not here be determined. We cannot see how the appellees could avail themselves of such defense. The bonds were all issued before the contracts were made with the appellee, and if the issue of bonds was beyond the power of the corporation in the incurring of indebtedness, *a fortiori*, the indebtedness to the lienors

was *ultra vires*. The lienors and bondholders would stand in precisely the same position, and it does not lie in their mouths to raise the objection. (*Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S., 649.) Furthermore, the proof does not sustain the appellees' contention. Section 5 of article 11 of the constitution prohibits railroad corporations from issuing any stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created. The articles of incorporation of the Beatrice road fix the capital stock at one million dollars. The only evidence in the record as to the issuance of stock is found in the contract of lease between the Beatrice road and the Wyandotte road, and in letters passing between officers of the Investment Company and officers of the Beatrice and Wyandotte roads. These letters, except in so far as they amount to admissions binding upon the corporation by whose authority they were written, do not constitute competent evidence upon the subject. The inference from the documents, however, is that the Beatrice road has issued seven hundred and fifty thousand dollars of stock; sufficient, if properly issued, to carry the bonds. It does not appear that any of this issue was illegal, unless it be certain stock issued to the Wyandotte Company in consideration of the covenants in the contract between the Beatrice and Wyandotte companies. Among these covenants was that of guarantying the bonds, and also of paying certain rentals, and performing many other duties in connection with the lease. It is not questioned by counsel that between companies occupying such relations one may hold the stock of the other, and in the absence of evidence, at least, as to the value of the covenants obtained from the Wyandotte road, it cannot be said that this stock was not issued for money, labor, or property actually received.

The majority opinion is largely based upon the conclusion that the Investment Company made itself a promoter

or principal in the construction of the road. This conclusion is reached upon the doctrine first established in this state in the case of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. The principle decided in that case has recently been much discussed in the cases of *Pickens v. Plattsmouth Investment Company*, 37 Neb., 272; *Holmes v. Hutchins*, 38 Neb., 601, and *Sheehy v. Fulton*, 38 Neb., 691. It is not necessary to repeat that discussion. We do not think the facts of this case warrant the court in applying that doctrine. Wherever it has been applied it has been for the purpose of charging the estate of the owner in fee on account of improvements made by his executory vendee. The court has in all cases for its application required the proof of facts sufficient to create the vendee the agent of the vendor expressly or by implication. Its application to this case requires a far-reaching extension of the principle. The Investment Company had no estate in the railroad company; it was not even a stockholder in the corporation; and we do not think it can be deemed an "owner" within the meaning of the mechanic's lien law. It is true that the Investment Company in making the loan insisted upon the method to be adopted for the construction of the road, and had extended negotiations with its promoters in regard to the organization of the company and the form of the loan and its security. We cannot see in these acts anything more than precautionary measures to secure the loan about to be made, and we believe that if the opinion of the majority be adhered to in future cases and carried to its logical conclusion, every one who lends money to another with the knowledge, or at least with the intention, that the borrower shall use the money to erect improvements upon land pledged to secure the debt, must be held to have rendered his security subject to any mechanics' liens arising out of the construction. This result would be contrary to the reason of past adjudications and we think unwarranted in principle.

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 Lean v. Andrews.
 

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## JOHN LEAN V. JOSEPH K. ANDREWS.

FILED JANUARY 3, 1894. No. 5456.

**Error Proceedings: RECORD FOR REVIEW.** Where a proceeding in error is prosecuted from the judgment of a justice of the peace to the district court, a petition in error must be filed in that court, specifically enumerating the errors relied on for a reversal of such judgment; and to enable the supreme court to review the judgment of the district court on said error proceeding, the petition in error, on which the district court acted, must be incorporated into the record brought here.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

*H. D. Travis*, for plaintiff in error.

*Wooley & Gibson, contra.*

RAGAN, C.

It appears from the finding and judgment of the district court in this record that John Lean sued Joseph K. Andrews and others before a justice of the peace of Cass county; that the case was tried to a jury on January 17, 1891, and a verdict returned in favor of Andrews; that the justice of the peace afterwards set aside this verdict and on June 22, 1891, rendered a judgment in favor of Lean and against Andrews. Andrews then prosecuted a proceeding in error to the district court to reverse this judgment of June 22, 1891. The district court sustained the error proceeding, affirmed the judgment of January 17, 1891, and reversed the judgment of the justice of the peace rendered on June 22, 1891. Lean brings the judgment of the district court here for review on error.

We cannot examine the errors alleged here by Lean, because the record contains no petition in error or other

38	656
41	202
38	656
43	124
38	656
62	515

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Godman v. Converse.

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paper informing us what errors were alleged by Andrews in his error proceeding from the justice of the peace and on which Andrews invoked the action of the district court. Where a proceeding in error is prosecuted from the judgment of a justice of the peace to the district court, a petition in error must be filed in that court specifically enumerating the errors relied upon for the reversal of the ruling or judgment of the justice of the peace; and to enable the supreme court to review the action of the district court on such error proceeding, such petition in error must be made a part of the record in the error proceeding brought here. The record before us sustains the judgment of the district court, and the same is

AFFIRMED.

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LOIS R. GODMAN ET AL., APPELLANTS, V. MARGARET  
F. CONVERSE, APPELLEE.

FILED JANUARY 3, 1894. No. 5607.

**Executors and Administrators: PROBATE COURTS: ALLOWANCE TO WIDOW.** Under subdivision 2, section 176, chapter 23, Compiled Statutes, 1893, a probate court has authority to make an allowance to a widow out of the personal estate or income of the real estate of her deceased husband, necessary for her maintenance, according to her circumstances, during the settlement of the estate, although the husband, by his will, lawfully disposed of all his property and the widow has accepted the provisions of such will.

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

*Charles O. Whedon*, for appellants.

*Marquett, Deweese & Hall*, contra.

RAGAN, C.

Dr. Joel N. Converse died in Lancaster county, Nebraska, in 1890, leaving a will, since duly probated, in and by which he bequeathed to his wife, the appellee here, the use during her life of certain lands in Lancaster county, and bequeathed to her, absolutely, his library, household goods, furniture, jewels, one buggy and harness, five head of horses, five cows, and \$6,000 in money. The sixth paragraph of the will provides: "All other property, whether personal or real, must be converted into money, and all my debts collected, and the proceeds thereof applied to funeral and court expenses, together with my indebtedness and bequests. Whatever may be remaining thereof will be divided between my two daughters." The eighth paragraph of the will contained this provision: "The bequest of my wife, Mrs. M. F. Converse, is in lieu of all appropriations as the law would give her, except one year's support, which I desire she shall have." The appellee duly accepted and consented to all the provisions of the will, and received as one year's support for herself \$600, allowed to her by the probate court out of the estate of her husband. December 24, 1891, the probate court made her a further allowance of \$75 per month, to be paid out of the doctor's estate, such allowance to begin October 11, 1891, and continue until the settlement of the estate. The case is here on appeal from this order.

This appeal challenges the authority and jurisdiction of the probate court to charge the estate of a decedent, pending the settlement of the estate, with the support of the widow, when such decedent has disposed of his personal estate by will and his widow has accepted the provisions thereof. Counsel for appellants say: "The probate court has no jurisdiction to make an allowance when the personal estate has been lawfully disposed of by will, and that the appellee could not take both under the will and the stat-

ute." The counsel bases his argument on section 176, chapter 23, Compiled Statutes, 1893. So much of it as we quote is as follows: "When any person shall die possessed of any personal estate, or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows: First—The widow, if any, shall be allowed all the articles of apparel and ornament, and all the wearing apparel and ornaments of the deceased, the household furniture of the deceased, not exceeding in value \$250, and other personal property, to be selected by her, not exceeding in value \$200; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate. Second—The widow and children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate, or out of the income of the real estate, as the court of probate may adjudge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances, which in case of an insolvent estate shall not be longer than one year after granting administration, nor for any time after the dower and personal estate shall be assigned to the widow." It would seem that the intention of this section of the statute was to provide for the distribution of the personal estate of a decedent, not disposed of by his will; that by the first subdivision of said section the widow is given the apparel, ornaments, two hundred and fifty dollars' worth of the household furniture and two hundred dollars' worth of such other personal property as she might select; and that a disposition of it to another by the will of the husband is made inoperative. In other words, the property enumerated in this first subdivision is exempt from the operation of the will of the husband, and belongs, on his death, to his widow; that by the second subdivision of this section the probate court could make to the widow and children constituting the family a reasonable allowance out of the

estate during the pendency of its settlement, only in cases where the husband died intestate, the legislature indulging the presumption that a testator would, by his will, set apart money or property, which, when added to the property given to the widow by law under the first subdivision of this section 176, would be sufficient to support herself and family during the time the estate might be in process of settlement. A probate court must have the authority of statute law to support an order by which the estate of a testator is charged with the support of his widow and family. The statute relied on to sustain the allowance in controversy here is section 176, quoted above, and, uninfluenced by authority, we would say that by this section the probate court had no authority or jurisdiction to make the order appealed from. We find, however, on investigation, that section 3935 of the statute of Wisconsin is, in all material respects, the same as said section 176.

In *Baker v. Baker*, 57 Wis., 382, a decedent left a will disposing of all his property. The will was duly probated. The probate court allowed the testator's widow for her support \$50 per month for one year after her husband's death; and, at the expiration of the year, by a second order, allowed her for her support an additional sum of \$50 per month, to continue during the pendency of the settlement of the estate. An appeal to the supreme court of Wisconsin was taken from this order, the appellants contending that the action of the probate court was a nullity, and section 3935 was relied on to sustain such objection. On the other hand, the appellees argued that said section 3935 was of itself statutory authority to support the order of the probate court. The supreme court said: "The argument is that under the provisions of section 3935 R. S., no allowance can be made to a widow in any case, when the deceased has died testate, and by his will disposed of all his property, both real and personal, unless the widow renounces all rights under the will. \* \* \* The con-

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struction of the clause contended for by the learned counsel for the appellant would as effectually prevent the payment of expenses of the administration, funeral charges, and debts in a case where the will of the deceased disposed of his entire estate as it would the setting apart and payment of the allowances to the widow and minor children. A construction put upon this provision of the law which would lead to such radical injustice certainly ought not to be adopted." And the court squarely decided that under subdivision 2, section 3935, a widow may have an allowance out of the estate of her deceased husband, although by his will he has disposed of all his property. For the construction of statutes similar to the Nebraska statute, section 176, *supra*, see *Moore v. Moore*, 48 Mich., 271; *Williams v. Williams*, 71 Mass., 24. We feel bound by the construction placed by the supreme court of Wisconsin on the statute under consideration, and following *Baker v. Baker*, *supra*, affirm the judgment of the district court.

AFFIRMED.

JOHN H. HOPKINS V. BARRETT SCOTT, TREASURER.

FILED JANUARY 3, 1894. No. 5492.

1. **Statutes: TITLES: PUBLIC FUNDS: DEPOSITORIES.** Chapter 50, Session Laws, 1891, relating to the keeping of state and county funds, is not in conflict with the constitution, either as containing more than one subject, or because of its providing that it shall not apply until the expiration of the terms of office of the state treasurer and of the several county treasurers in office at the time of its passage.
2. **Repeal of Statutes.** That act did not operate to repeal article 2, chapter 18, Compiled Statutes, relating to the removal of county officers.
3. ———. Nor was article 2, chapter 18, Compiled Statutes, repealed by the act of 1879, specifying powers of county boards.

38	661
43	333
38	661
44	11
38	661
46	76
38	661
47	546
38	661
51	190
53	225
53	8
53	830
38	661
61	257

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4. Where, in proceedings to remove a county officer, the officer complained against makes an appearance, obtains a continuance, and at the time to which the continuance was had proceeds to trial without further objection because of the time of hearing, he cannot upon proceedings in error be heard to urge that sufficient time was not allowed to prepare his defense.
5. **Removal of County Officers: PROCEEDINGS OF SUPERVISORS.** In such proceedings the fact that some of the supervisors who tried the case were also witnesses does not invalidate the judgment.
6. ———: ———: **QUORUM.** Nor is it necessary that all the members of the board of supervisors be present at the hearing. A quorum is sufficient.
7. **Bill of Exceptions.** There is no authority of law for the settlement of a bill of exceptions embodying the evidence taken on such hearing. MAXWELL, C. J., dissenting.

ERROR from the district court of Holt county. Tried below before BARTOW, J.

The facts are stated in the opinion.

*Reese & Gilkeson, H. E. Murphy, and M. F. Harrington*, for plaintiff in error:

In the absence of statutory power a board of supervisors is without authority to sign, settle, and allow a bill of exceptions. (*Taylor v. Tilden*, 3 Neb., 339; *Kellogg v. Huntington*, 4 Neb., 96; *Rudolph v. Winters*, 7 Neb., 127; *Nickerson v. Needles*, 32 Neb., 230; *State v. Oleson*, 15 Neb., 247; *Donahue v. Will County*, 100 Ill., 94.)

The board could act without all members being present. (*State v. Board of Supervisors of Saline County*, 18 Neb., 422.)

*John H. Ames, amicus curiæ*, filed a printed argument in favor of the validity of the act to provide for depositing state and county funds in banks.

*H. M. Uttley and R. R. Dickson, contra:*

A bill of exceptions can be properly and legally authen-

ticated and certified to by each member of the board of supervisors individually, and when certified to by a majority of the members constituting said board of supervisors, the same should be upheld, and considered by the courts. (Maxwell, Pleading & Practice [4th ed.], p. 717; *Law v. Jackson*, 8 Cow. [N. Y.], 746; *Kennedy v. Trustees of Covington*, 4 J. J. Marshall [Ky.], 543; *Darling v. Gill, Wright* [O.], 73.)

When a new statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on that subject. (*United States v. Barr*, 4 Sawyer [U. S.], 254; *United States v. Claflin*, 97 U. S., 546; *Dowdell v. State*, 58 Ind., 333; *State v. Rogers*, 10 Nev., 319; *Tafoya v. Garcia*, 1 N. M., 480; *Campbell v. Case*, 1 Dak., 17; *Andrews v. People*, 75 Ill., 605.)

The law under which the proceeding before the county supervisors was commenced has been repealed by implication. The board had, therefore, no jurisdiction over the subject-matter of the action, and was without power to conduct the examination. (*Stewart v. Otoe County*, 2 Neb., 177; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 42; *Saxon v. Kelley*, 3 Neb., 107; *People v. Commissioners of Buffalo County*, 4 Neb., 157; *Hamlin v. Meadville*, 6 Neb., 233; *State v. Buffalo County*, 6 Neb., 460; *McCann v. Otoe County*, 9 Neb., 330; *Walsh v. Rogers*, 15 Neb., 311; *State v. Lincoln County*, 18 Neb., 283.)

*G. M. Lambertson*, also for defendant in error:

The judgment of ouster rendered by the board of supervisors is fraudulent and invalid, because some of the supervisors sat as judges to try the accused, gave testimony against him, and then voted in support of the judgment of ouster. (*Vanderlip v. Derby*, 19 Neb., 165; *Foster v. Devenney*, 25 Neb., 73; *State v. Kaso*, 25 Neb., 608; *State v. Weber*, 20 Neb., 467; *Burnett v. Burlington & M. R. Co.*,

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16 Neb., 334; *Ensign v. Harney*, 15 Neb., 330; *Tomlinson v. Derby*, 14 Am. Law Reg. [Conn.], 543; *Stockwell v. Township Board of White Lake*, 22 Mich., 341.)

There should have been a full board present to hear the case. (*Hutchinson v. Ashburn*, 5 Neb., 402.)

Chapter 50 of the Laws of 1891 is unconstitutional, because it provides that the law shall not be enforced until 1893. Section 24 of article 3 of the constitution, providing that no act shall take effect until three calendar months after the adjournment of the session at which it was passed, unless in case of emergency, is a limitation upon the legislative power to say when laws shall take effect. (Cooley, *Constitutional Limitations*, p. 188; *Wheeler v. Chubbuck*, 16 Ill., 361; *Board of Supervisors v. Keady*, 34 Ill., 293.)

The law is unconstitutional, because the bill contains more than one subject. It applies to the public funds of both the county and state. (*White v. City of Lincoln*, 5 Neb., 505; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.)

#### IRVINE, C.

On March 1, 1892, John H. Hopkins filed his complaint before the board of supervisors of Holt county, charging that in November, 1891, Barrett Scott was elected county treasurer and qualified January 7, 1892, and then entered upon the duties of his office; that since the 7th day of January, 1892, Barrett Scott had been guilty of official misdemeanors and willful maladministration in his office in certain particulars specified in the complaint. The matters particularly charged may be summarized as depositing in and loaning to certain banks different sums of money, being the moneys of Holt county which came into his hands as county treasurer, and receiving interest upon such money for his own use and benefit, and that said moneys were deposited to the individual credit of Scott and without any bond for the repayment thereof. It was further

charged that Scott unlawfully removed the sum of \$50,000 of the public moneys of Holt county upon the 26th day of February, 1892, and delivered \$35,000 thereof to a certain bank in Omaha; and further, that he had received \$150 in payment for certain certificates and had only entered one-eighth of the fees received therefor upon the books. A notice was served upon Scott requiring him to appear before the board of supervisors upon March 2, 1892, to answer the complaint. At the hour named, upon motion of Scott, the hearing was continued until the following morning, when, in the absence of Scott, a plea of not guilty was entered for him, and thereafter Scott filed objections to the jurisdiction of the board to try the case. These objections were overruled, whereupon further objections were made because every member of the board was not present. The record shows that two of the members were absent. Certain other objections were filed, some of which will be noticed hereafter, and finally it was determined that no further motions or pleadings be received except a motion to reject the complaint, a demurrer, or an answer. The board then proceeded to try the case. Scott was found guilty of the charges, and a judgment of ouster was entered. An attempt was made to secure a settlement of a bill of exceptions. Certain members of the board refused to sign the proposed bill, and upon *mandamus* proceedings they were compelled to do so. The case was taken on error to the district court, where it was heard upon the record, including the bill of exceptions settled in obedience to the writ of *mandamus*. In the district court a motion was made to quash the bill of exceptions, one of the grounds being that the allowance of the bill was not authorized by law. This motion was overruled. Upon the final hearing the judgment of the board of supervisors was reversed on the following grounds: First, that the board of supervisors had no jurisdiction of the subject-matter; second, that there was no evidence to sustain such judgment. There

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are certain other findings in the judgment of the district court, but they all resolve themselves under the foregoing heads. The case is brought to this court upon error by Hopkins.

A great many questions are raised in regard to the accuracy of the bill of exceptions, and as to whether or not its allowance was regular; as to whether the district court had any authority to grant a writ of *mandamus* compelling its allowance; whether its signature by the majority of the supervisors, and not by every member, was sufficient; and as to whether there is any authority for a bill of exceptions in such a case. The conclusion reached upon the last of these questions removes all others from the case. It may be taken as settled that the right to a bill of exceptions is not implied from the right to prosecute proceedings in error, and that a bill of exceptions cannot be allowed except in pursuance of statutory authority. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) In the case cited the whole question is discussed at length and the authorities reviewed. There is no statutory authority for a bill of exceptions in such a case as this, and while the case last cited and those therein discussed are not exactly similar in their facts, the principles upon which they rest are precisely the same. We think, therefore, that the district court should have sustained the motion to quash the bill of exceptions, and erred in considering it as a part of the record in the case. It may be that the law should provide a method for bringing up the evidence in such cases as this as well as others, but, as said in *Moline, Milburn & Stoddard Co. v. Curtis*, *supra*, this rests with the legislature, and if the law is defective, the court cannot supply its defects.

With the questions raised by the bill of exceptions eliminated, few of the many questions presented in the briefs remain for decision. The first of these, however, is of vital importance, and is probably the point upon which the dis-

strict judge based his decision. Compiled Statutes, chapter 18, article 2, provides for the removal of county officials for official misdemeanors, classified under eight heads, one of which is willful maladministration in office, and provides that any person may make such charge, and that the board shall have exclusive original jurisdiction thereof. Questions of fact must be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing him from office.

By chapter 50 of the Laws of 1891 it was provided that county treasurers shall deposit in state or national banks doing business in the county, and of responsible standing, the amounts of moneys belonging to the several current funds of the county treasury; that said deposits shall be subject to check, and that interest shall be paid to the county of not less than three per cent per annum of the amounts so deposited. The act also provided for the keeping of accounts thereof and the giving of bonds by the depository for the safe keeping and payment of such deposits. The act also forbade the making of profit, directly or indirectly, by the county treasurer out of any money belonging to the county, and forbade the removal of any part of the county funds except for the payment of warrants or making deposits in pursuance of the act, and made such unlawful removal a felony. It also made a willful failure or refusal of the treasurer to perform his duties under the act a misdemeanor.

It is urged that the act of 1891 is unconstitutional, as containing more than one subject. The act provided both for the depositing of state funds and for the depositing of county funds, and it is contended that each of these forms a separate subject of legislation. The general object of the act is to provide for the safe custody of public funds, and it seems to us that this is a single subject of legislation, whether the funds are state or county. The object of the act is plainly expressed in its title, and the combination of

provisions in regard to both state and county funds presents none of those objections which influenced the adoption of the constitutional inhibition against uniting two or more subjects in a single act. In the recent case of *Trumble v. Trumble*, 37 Neb., 340, the effect of the clause of the constitution referred to was considered, its object discussed, and former decisions of this court reviewed. It is not deemed necessary to repeat the discussion here. We think the object of this act is single. If it had related to the custody of all public funds of whatever description without separately naming them, no question could well be raised upon the point now urged; and the fact that the act, instead of using general language applicable to all public funds, in terms specified separately state and county funds, does not render it subject to the objection of duplicity.

It is also claimed that the act of 1891 is unconstitutional, because it provides that it shall not take effect until the expiration of the terms of the county treasurers current at the passage of the act. It is said that this is in conflict with the constitutional provision that all acts shall take effect upon the expiration of three calendar months after the adjournment of the legislature. We think the limitation was one which could be properly made by the legislature. The act, as an act, did go into effect under the constitutional provision referred to. It became the law of the state from that time. But the classes of persons to whom it applied only came into existence upon the expiration of then current terms of office. Until three months after the adjournment of the legislature the act could not have taken effect, even though terms of treasurers might have expired during the interval. After the constitutional period for the act to take effect had expired, it became the law, and has, as fast as the terms of treasurers expired, become operative. It was the law from that time, although it may have been without practical effect for want of subject-matter to act upon.

The further contention is made that conceding the act of 1891 to be constitutional, it operated to repeal article 2, chapter 18, Compiled Statutes, and left the county board without jurisdiction to try the case. This argument is based upon the fact that the act of 1891 renders criminal a failure or refusal of the treasurer to obey its provisions, and it is argued that inasmuch as maladministration in these particulars was made a criminal offense, the remedy provided by the act is exclusive. Repeals by implication are not favored, and an act will not be held to repeal a former act unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137; *State, ex rel. Berry, v. Babcock*, 21 Neb., 599.) There is no repugnancy between these two acts. The commission by a treasurer of crimes created by the act of 1891 would not, *ipso facto*, remove him from office. It would require a conviction at least to do so, and the county need not await such conviction before removing him from office. The object of article 2, chapter 18, Compiled Statutes, is not to punish an officer for criminal acts, but simply to protect the county by removing him from office. The proceedings thereunder are in some ways analogous to proceedings in impeachment, and by the express terms of the constitution a conviction upon impeachment is no bar to a prosecution for the same offense as charged in the impeachment. (Constitution, art. 3, sec. 14.) There is no reason why an unfaithful county officer should not be removed from office because of his infidelity and also be punished criminally for the same act, provided it amounts to a crime. We repeat that there is no repugnancy between the provisions of the Compiled Statutes referred to and the act of 1891. They can both be enforced without conflicting with one another, and upon well established principles they should both be held to be in force.

For similar reasons we cannot concur in the views of defendant in error, that the act of 1879, specifying certain

powers as belonging to the county board, operated, by omitting reference to the powers conferred by article 2, chapter 18, to repeal that article.

The transcript of the proceedings of the board of supervisors shows the rulings of the board upon certain questions of evidence. In no case, however, does it state more than the question asked to which objection was made and the ruling thereon. This is not sufficient to enable the court to pass upon the admissibility of the evidence. The answers do not appear. The offers of proof do not appear, and there is not sufficient to enable the court to determine the nature of the evidence. It is even doubtful whether as much as does appear was properly incorporated into the minutes of the board.

Some objection was made because of the insufficiency of the time allowed to the defendant before the trial. It does appear that the action of the board was somewhat summary, but the defendant seems to have obtained a continuance upon his own motion, and we do not think that after such proceedings he can be allowed to urge this objection. At the time when the case was taken up for trial he proceeded without objection upon this ground.

The objection that all the members of the board were not present at the trial is not well taken. There is no express provision of the statute in this regard, and in the absence of special provisions, the general laws in regard to proceeding by a quorum must be held applicable. The constitutional provisions relating to the supreme court sitting as a court of impeachment are not applicable.

Counsel for Scott made objections to the board's deciding the case, because certain members of the board were witnesses. Regarding the proceeding as a strictly judicial inquiry, this would not oust the court of jurisdiction. A judge or juror may be called as a witness, and is not from that fact alone disqualified from sitting in judgment on a case. (Thompson, Trials, sec. 77, note 5, and cases there cited.)

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Certain other objections appear in the record, but the facts upon which they are based do not, and their merits, therefore, cannot be considered.

We do not think that the record of the proceedings of the board of supervisors discloses any error. The complaint sufficiently charges offenses amounting to maladministration in office, and the evidence must be presumed to support the complaint and judgment. The judgment of the district court is reversed and that of the board of supervisors affirmed.

JUDGMENT ACCORDINGLY.

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WILLIAM J. MAXWELL, APPELLANT, V. STEPHEN H.  
HIGGINS ET AL., APPELLEES.

38	671
57	352

FILED JANUARY 3, 1894. No. 5149.

1. **The record of a deed is not admissible in evidence unless the certificate of acknowledgment is substantially in accordance with the statute.**
2. **Pleading.** Facts pleaded in a petition will be taken as admitted where not specifically denied in the answer, and the answer avers as to such facts that the defendants, for want of knowledge, neither admit nor deny the averments of the petition.
3. **Tenancy in Common.** A conveyance to two or more persons not acting in a fiduciary capacity will be presumed to create a tenancy in common, and not a joint tenancy.
4. **Adverse Possession.** Where one has been in possession of land, claiming ownership, and permits the land to be sold for taxes, and the grantee in the tax deed, although it was void on its face, enters into possession and remains in possession for a period of more than a year, such possession interrupts that of the prior occupant.
5. **Estoppel.** Where a claimant of land acts under a power of attorney from an adverse claimant, and as such attorney leases the land in the name of the adverse claimant, he and his grantees

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are by such acts estopped from asserting that the possession of the tenant inured to him and not to the adverse claimant.

6. **Action Quia Timet.** One cannot in the same action to quiet title assert against one defendant that conveyances to such defendant were adverse to plaintiff's title and a cloud thereon, and ask that they be canceled, and against another defendant assert that the possession of the first defendant was in subordination to plaintiff's title and a link in the establishment of adverse possession.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

The opinion contains a statement of the case.

*Cornish & Robertson and James F. Morton*, for appellant:

Where one of two tenants in common conveys the entire estate by warranty deed to a purchaser, and the purchaser enters into possession under such deed and receives the rents and pays the taxes, his possession is construed as co-extensive with the estate conveyed by the deed, and becomes adverse to his co-tenant from the moment of entry. (*Unger v. Mooney*, 63 Cal., 586; *Culler v. Motzer*, 13 S. & R. [Pa.], 356; *Buswell*, Limitations and Adverse Possession, secs. 299-301, and notes; *Sedgwick & Wait*, Trial of Title to Land, sec. 287, and cases cited.)

Ellen McKelligon, being a mortgagee, is conclusively presumed in law to have purchased the tax title, or redeemed, as the case may be, to protect her security, and her possession is presumed to be subordinate and not adverse to the title of her mortgagor. (*McKeighan v. Hopkins*, 19 Neb., 38; *Comstock v. Michael*, 17 Neb., 300; *Young v. Brand*, 15 Neb., 604; *Hall v. Westcott*, 5 Atl. Rep. [R. I.], 629; *McLaughlin v. Green*, 48 Miss., 175; *Woodbury v. Swan*, 59 N. H., 22; *Christy v. Fisher*, 58 Cal., 256; *Moore v. Titman*, 44 Ill., 367. *Connecticut Mutual Life Ins. Co. v. Bulte*, 45 Mich., 113; *Martin v. Swofford*, 59 Miss., 328; *Fisk v. Brunette*, 30 Wis., 102; *Chickering v. Failes*, 26

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Ill., 507; *Brown v. Simons*, 44 N. H., 475; *Schenck v. Kelley*, 88 Ind., 444; *Fair v. Brown*, 40 Ia., 209; *Middleton Savings Bank v. Bacharach*, 46 Conn., 513; *Whitney v. Gunderson*, 31 Wis., 359; *Moss v. Shear*, 25 Cal., 38; *McPherson v. Hayward*, 17 Atl. Rep. [Me.], 164.)

Ellen McKelligon redeemed from the tax sale October 22, 1879. Jolliffe, Price, and Sayer filed a motion asking leave to intervene in this action January 18, 1890. Between said dates the land was in possession of parties recognized and held in subordination to the title of plaintiff and his grantors. The date prior to which plaintiff must show ten years' adverse possession is the date of bringing the new parties into court. (*Jeffers v. Cook*, 58 Cal., 148; *Shaw v. Cook*, 78 N. Y., 196; *Miller v. McIntyre*, 6 Pet. [U. S.], 61; *Dudley v. Price*, 10 B. Mon. [Ky.], 84; *Corder v. Dolin*, 4 Bax. [Tenn.], 240; *Augusta Mfg. Co. v. Vertrees*, 4 Lea [Tenn.], 83; *Lagow v. Neilson*, 10 Ind., 183, *Thomas v. Fame Ins. Co.*, 108 Ill., 92; *Atkinson v. Amador & Sacramento Canal Co.*, 53 Cal., 102; *Brown v. Goalsby*, 34 Miss., 437; *Sweet v. Jeffries*, 67 Mo., 420.)

*A. S. Churchill, contra.*

IRVINE, C.

This was a suit to quiet title to block 21, West Omaha. It was originally begun by Maxwell against Stephen Hewitt Higgins, Maurice J. McKelligon, the unknown heirs of Ellen McKelligon, the unknown heirs of Mehitable Higgins, and the unknown heirs of M. Swinny. The original petition alleged title in the plaintiff as follows: That on January 9, 1867, Stephen Hewitt Higgins and Mehitable Higgins became joint owners of the land; that during 1867 Mehitable Higgins died intestate; that on January 27, 1870, Stephen Hewitt Higgins conveyed to Maurice J. McKelligon, and on February 11, 1887, McKelligon conveyed to plaintiff; that from 1870, until the conveyance to plaintiff,

McKelligon remained in the continuous and uninterrupted possession of the land; that since the conveyance to plaintiff, plaintiff had remained in peaceful and quiet possession thereof. The petition further alleged that on March 4, 1878, the treasurer of Douglas county executed a deed to M. Swinny for the taxes of 1874; that the tax deed was void for certain reasons set out in the petition; that Swinny died intestate, and that certain persons claiming to be her heirs conveyed by a series of conveyances to Ellen McKelligon; that Ellen McKelligon died testate, by her will attempting to devise to the children of Maurice McKelligon. The petition prayed that the tax deed, and other deeds made in pursuance thereof, be declared void.

Upon January 18, 1890, a motion was made by Laura Jolliffe, Samuel S. Price, Jr., and Edward Sayre, asking that they be made parties defendant. No order seems to have been made upon this motion, but upon February 15, 1890, an order was made granting the plaintiff leave to file a supplemental petition making these persons defendants. This supplemental petition alleged, in brief, that Price, Sayre, Laura Jolliffe, Sarah A. Selden, and Mehitable Higgins had conspired to cast a cloud upon plaintiff's title, and in pursuance of that conspiracy a deed had been made by Sarah A. Selden to Mehitable Higgins of an undivided one-half of the property, and that thereafter certain other deeds were executed, set forth in particular, whereby it was attempted to convey this interest to Price, Sayre, and Jolliffe. It is further alleged that all of Sarah Selden's title had been conveyed to Mehitable Higgins and Stephen Hewitt Higgins January 9, 1867, but the deed of conveyance was defective in acknowledgment, through a clerical error, only; that Mehitable Higgins never had any equitable title, but that Stephen Hewitt Higgins paid all the purchase money for the property, and that the subsequent deeds to the new defendants were made without consideration and with notice of the facts. The supplemental petition also

averred peaceable, continuous, open, notorious possession in plaintiff and his grantor from May 17, 1869, and prayed for an annulment of the deeds from Sarah Selden, Mehitable Higgins, and subsequent deeds in that chain of title.

The new defendants, Price, Sayre and Jolliffe, answered alleging that Mehitable Higgins was the owner until December 17, 1889, when she conveyed to Jolliffe. They admit the tax deed was void, deny the possession of plaintiff and his grantor, aver that they bought for value and without notice, and ask for an establishment of their title to an undivided one-half.

The reply is quite long, but amounts to a reassertion of the allegations of the supplemental petition, a denial of all other facts alleged in the answer, and the pleading of certain other facts not necessary here to notice in detail.

The decree recites that the cause was heard on the supplemental petition, the answer of Jolliffe, Price, and Sayre, and the reply thereto, and the evidence. It finds for the defendants named as to the undivided one-half, quiets the title of that one-half interest in those defendants and the other one-half in the plaintiff.

The foregoing statement of the pleadings discloses a somewhat complicated state of title and a rather anomalous series of issues. Their statement has been necessary because of the importance of the pleadings in determining some of the questions arising in the case. In its further consideration it will be convenient to follow out the title as disclosed by the pleadings and evidence with occasional references to averments not heretofore stated.

It appears inferentially from the pleadings, and directly by a formal admission in the bill of exceptions, that one Oscar B. Selden was the patentee of the land in controversy. There was offered in evidence the record of a deed dated January 9, 1867, from Oscar B. Selden and wife purporting to convey the land to Mehitable Higgins and Stephen Hewitt Higgins. This record was objected to and properly

excluded, for the reason that the deed appeared to have been acknowledged by the grantees and not by the grantors. This deed is not very material, however, because it appears from the answer of the defendants that they claim a one-half interest under Mehitable Higgins. The deed is pleaded in the petition, and there is no denial of its execution in the answer, but on the contrary an averment that the defendants, not knowing the facts, neither admit nor deny the allegations of the petition in regard to conveyances therein alleged. The deed must therefore be taken as admitted.

The reply avers that Mehitable Higgins and Stephen Hewitt Higgins were coparceners, or joint tenants, and not tenants in common. There is not a particle of evidence to establish such facts. In the United States joint tenancies are not favored, and except in case of trustees or others acting in a fiduciary capacity, an estate in two or more persons is generally construed as a tenancy in common where joint tenancies have not been abolished by statute. (Tiedeman, Real Property, sec. 237, and cases cited.) It would, therefore, be presumed that Stephen Hewitt Higgins and Mehitable Higgins were tenants in common, but the distinction is of doubtful importance, in view of the fact clearly established that Mehitable Higgins was not dead at the time of the conveyance next referred to.

It is also alleged in the supplemental petition that Stephen Hewitt Higgins paid all the purchase price to Selden, and that Mehitable Higgins never had any equitable interest in the property. In the reply these allegations are modified by pleading that the money was paid by "— Higgins" and Stephen Hewitt Higgins. There is no evidence in support of either of these averments; upon the contrary the testimony of Mehitable Higgins, which stands uncontradicted, is that a considerable portion, probably the greater portion, of the purchase money was paid out of her own funds.

In 1867, then, Mehitable Higgins and Stephen Hewitt Higgins became legally and equitably tenants in common of the property. In May, 1869, a bond for a deed was executed by Stephen Hewitt Higgins, whereby he bound himself to convey the entire estate to Maurice J. McKelligon, and upon January 27, 1870, Stephen Hewitt Higgins executed to Maurice J. McKelligon a deed purporting to convey to him the entire estate. In 1887, McKelligon executed a deed to plaintiff purporting to convey to him the entire estate. From what has been said it is clear that McKelligon acquired from Higgins and conveyed to plaintiff only an undivided one-half interest, and plaintiff has no other paper title. A paper title to the other undivided one-half is established in the defendants by a series of deeds not necessary to recite in detail, but beginning with one dated December 17, 1889, from Mehitable Higgins to Laura Jolliffe. There is also in this chain a deed from Sarah Selden, widow and sole devisee of Oscar B. Selden, to Mehitable Higgins. This purports to convey the whole estate, but must be rejected as immaterial because of the conveyance in 1867 to the Higginses standing admitted by the pleadings. So far, then, as the paper title is concerned, one-half was thus far shown in the plaintiff and the other one-half in the defendants, as established by the decree. The plaintiff claims, however, title to the whole by adverse possession. The evidence shows quite clearly that McKelligon, at the time he took the conveyance from Higgins, and probably in 1870, went into possession of the land, lived upon it for some time himself, leased it to different tenants, and that it was occupied either by actual residence or by tenants cultivating the land with such occasional brief intervals as were required by changes in tenants, and without interruption on the part of adverse claimants until 1878. It may also be assumed for the purposes of this case that a conveyance by one of two tenants in common purporting to convey the whole estate, the

placing of the deed on record, and possession taken by the grantee, constitute an ouster of the other co-tenant and establish a possession adverse to him. (*Culler v. Motzer*, 13 S. & R. [Pa.], 356; *Foulke v. Bond*, 41 N. J. Law, 527; *Kinney v. Slattery*, 51 Ia., 353; *Kittredge v. Locks & Canals*, 17 Pick. [Mass.], 246; *Unger v. Mooney*, 63 Cal., 586.)

There is some question as to whether McKelligon's possession began in 1869 or 1870. At any rate it had not continued for a period of ten years, when the facts occurred which we are next called upon to notice. Upon March 4, 1878, a tax deed was issued to M. Swinny. This deed is admitted to have been void on its face, but such a deed is sufficient to establish color of title in cases where color of title is necessary. (*Gatling v. Lane*, 17 Neb., 77; *Lantry v. Parker*, 37 Neb., 353.) J. R. Hendrix was Mrs. Swinny's agent in the matter. He, at the time, made some trifling repairs on the premises, which seem then to have been unoccupied. Upon May 5, 1878, Hendrix leased the premises to one Campbell, who entered into possession and held until the following February, when one Tatom moved on as the tenant of Swinny. Upon October 22, 1879, the heirs of Swinny executed a quitclaim deed to Ellen McKelligon, the mother of Maurice. At this time Ellen McKelligon seems to have held a mortgage upon the premises executed by Maurice in 1878. There is evidence tending to show that the money paid to the Swinny heirs was furnished by Maurice and not by his mother; and it is claimed that the transaction amounted in effect to a redemption by McKelligon from the tax sale.

It is also claimed that McKelligon re-entered and leased the premises to different tenants, collecting the rents, and paying the taxes down to the time he conveyed to plaintiff. This is not, however, borne out by the evidence. Upon the contrary, it appears that McKelligon was acting under a power of attorney from Ellen McKelligon, and at least one of the leases made after the conveyance from the

Swinny heirs was made in the name of Ellen McKelligon by virtue of that power of attorney. The original petition charged that the tax deed was void and that the conveyance by the Swinny heirs to Ellen McKelligon was made without any interest in the grantors, and that Ellen McKelligon's will, devising the property to the children of Maurice, passed no title; and the prayer of the original petition was to set aside the tax deed and the deeds and wills in pursuance thereof, not for the reason that Ellen McKelligon was a trustee for Maurice and the plaintiff, but because it was an adverse, ill-founded claim and a cloud upon plaintiff's title. The plaintiff cannot therefore tack the two years' possession of the tax claimant to the subsequent possession or the prior possession of McKelligon in order to establish possession for the statutory period, nor can he claim that the possession subsequent to the deed from the Swinny heirs was Maurice McKelligon's own, in the face of the admission upon the pleadings and in face of the fact that Maurice, in making the lease on behalf of Ellen McKelligon, acted as her attorney in fact, and not on his own behalf. The plaintiff, therefore, failed to establish title by adverse possession.

It appears from the evidence that in 1878 Maurice McKelligon was declared a bankrupt, and a deed was made conveying his property to an assignee, and that there is no record of any discharge from bankruptcy. This matter is not important, in view of the conclusion reached that upon other grounds the defendants were entitled to have their title established to an undivided one-half. This is all they claim, and imperfections, if any, existing in plaintiff's title to the other one-half cannot be taken advantage of by these defendants. The matter is merely referred to here in order that it may be understood that we do not and cannot upon appeal from this decree adjudicate the effect of the bankruptcy proceedings.

JUDGMENT AFFIRMED.

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40	58

**JACOB SCHNEIDER V. PATTERSON, MURPHY & COMPANY.**

FILED JANUARY 3, 1894. No. 5029.

1. **Evidence of Partnership.** The record of the certificate provided for in sections 27 to 29, chapter 65, Compiled Statutes, is not the only evidence by which the existence of a partnership may be established. Notwithstanding that statute, a partnership may be proved by any method permissible before the enactment.
2. **Landlord and Tenant: DESCRIPTION OF LAND IN LEASE: PAROL EVIDENCE.** A written lease described the demised land as "four acres out of lot four," in a certain governmental subdivision "lying north of the railroad track." *Held*, That in an action between the lessor and lessee's assignee parol evidence was admissible to show that the lessor and lessee, about the time the lease was made, had gone upon the land and agreed upon certain lines and monuments as defining its boundaries.
3. **In an action by the lessee's assignee against the lessor to recover damages** because the lessor had subsequently leased a portion of the land to a third person, placed such third person in possession and excluded the plaintiff therefrom, *held*, that it was no defense to show that the assignee, at the time of the assignment, knew of the subsequent lease, or of the original lessee's exclusion, the assignee standing in the place of the original lessee and being entitled to all his rights.
4. **Landlord and Tenant: BREACH OF LEASE: MEASURE OF DAMAGES.** Where such lease was made for the purpose of enabling the lessee to mine sand from the land, the measure of damages is the value of the occupancy of the land for that purpose; and evidence showing the quantity of sand upon the land, the cost of removing the sand, and its market value is admissible for the purpose of ascertaining the damages.

ERROR from the district court of Cass county. Tried below before FIELD, J.

*W. L. Browne and E. H. Wooley, for plaintiff in error.*

*A. N. Sullivan, contra.*

IRVINE, C.

Patterson, Murphy & Co., by that name, brought this action in the district court of Cass county, alleging that the plaintiffs were a partnership formed for the purpose of doing business in this state; that the defendant Schneider leased a tract of land of four acres in Cass county for the term of five years to one Jerry L. Farthing and received the full rent therefor; that the lease was made with the privilege of taking sand from the land; that Farthing assigned the lease to plaintiffs, and then, at some length, the petition alleges that Schneider leased two and one-quarter acres of said land to another company and put the lessee in possession, and prays damages for the exclusion of plaintiffs from that portion of the land. Two answers appear in the record. It may be assumed that the later one filed was intended as an amended answer and will be treated as such. By that answer, Schneider avers that the "full amount of ground claimed by plaintiffs in this action was by them taken, occupied, and used, and that no part of the ground sold to the Omaha Gravel Company was included in the purchase so made by plaintiffs or their assignor herein. Defendant, therefore, denies each and every material allegation in said cause alleged and avers that plaintiffs have nothing to complain of. The defendant denies that there is in existence any such person or firm as plaintiff alleged herein." There was a verdict and judgment for plaintiffs.

The first assignment of error to be noticed relates to the admission of parol testimony to prove the existence of the partnership. This evidence was objected to as incompetent, for the reason that sections 27, 28, and 29 of chapter 65, .Compiled Statutes, provide for filing in the office of the county clerk a certificate showing the names of individuals doing business under a firm name and make that record evidence. It is claimed that such certificate is the only

competent evidence of the existence of a partnership. It is doubtful whether this issue was really presented by the pleadings. The affirmative averment that plaintiffs had occupied all the land leased seems to be inconsistent with the denial of the existence of plaintiffs. However, the trial court treated the issue as properly raised, and the question is one of importance and will be considered upon its merits.

The statute referred to provides in section 27 that any association of persons doing business in any county under a firm, partnership, or corporate name, and not incorporated under the laws of this state, shall have recorded in the office of the county clerk of the county where the place of business is located, a certificate signed by each member of said association showing, first, the name of the association; second, the general nature of the business and principal place of doing business; and third, the full name and residence of each individual member of the association. Section 28 provides for the recording of such certificates and makes the record or a certified transcript *prima facie* evidence of the facts therein set forth. Section 29 provides a penalty against any person who shall, for the space of twenty days, fail, neglect, or refuse to comply with the provisions of the act. This statute has several times been called to the attention of the court. In *Shriver v. McCloud*, 20 Neb., 474, the same objection seems to have been urged as presented in this case, but that was an action between the persons alleged to be partners, and the court disposes of the question by saying that the parties were *in pari delicto*, and, whatever might be the true construction of the act, its provisions could not be invoked by one partner against the other, both being equally responsible for the failure to make and file such certificate. A doubt, however, is expressed as to whether the statute applies in any case where the partnership name is that of one or all of the partners. In *Milligan v. Butcher*, 23

Neb., 683, somewhat curiously the objection seems to have been directly the opposite of that here urged; that is, the record of the certificate was objected to as incompetent, and the court merely held that such record was admissible. These decisions do not assist greatly in disposing of the question before us. It is, perhaps, worthy of consideration, that in a number of cases arising since the passage of the statute in question the existence of a partnership has been proved by the usual parol evidence, and the court has decided a number of questions in regard to the admissibility of evidence for that purpose, without, so far as we are aware, once alluding to this statute as affecting the common law rules in regard to such proof. An inspection of the statute discloses that there is no prohibition against forming a partnership or transacting a partnership business except in compliance with the act, but merely a penalty for failing or refusing to file the certificate within a certain period after the formation of the partnership or commencement of business. The object of the act was to make a matter of public record the names of persons composing unincorporated associations, and it was chiefly no doubt to enable persons doing business with such associations to ascertain the responsible individuals. In enforcing this object, undoubtedly, cases might arise presenting estoppels against partners by reason of statements in the certificates or by reason of the failure to file certificates; but the act was not intended to restrict the power of individuals to form partnerships or to provide an exclusive method for their formation. The statute makes the certificate only *prima facie* evidence upon the subject, and we do not think that it has the effect of making it the sole or exclusive evidence. This assignment of error must, therefore, be overruled.

Another assignment of error is the admission in evidence of the assignment of the lease from Farthing to the plaintiffs, upon the ground that it was not witnessed. A refer-

ence to the answer shows that the defendant avers that the plaintiffs occupied all the land "included in the purchase so made by plaintiffs or their assignor herein." This averment admits the fact of the assignment, and the subsequent general denial cannot be taken as countervailing against such admission.

The principal contention arises out of the admission of evidence to identify the land demised. The description in the lease is as follows: "Four acres out of lot four in S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of sec. 5, T. 12, R. 11, in Cass county, Neb., lying on the north side of the railroad track." Parol evidence was admitted over defendant's objections, which disclosed that the lessor owned more than four acres lying north of a certain railroad track and which tended to show on the part of the plaintiffs that the lessor and original lessee had gone upon the land, plowed a furrow along a portion at least of what was intended to be one of the lines of the tract demised, "stepped off" the rest of the tract and agreed as to the boundaries of the tract. The question is, was such evidence admissible? The plaintiff in error contends that the description in the lease is uncertain upon its face and cannot be helped out by parol evidence. Parol evidence doubtless would have been admissible to show that the lessor owned only four acres in lot four, or to show that only four acres in lot four lay north of the railroad track. (*Adams v. Thompson*, 28 Neb., 53; *Ballou v. Sherwood*, 32 Neb., 666.) So, too, had the evidence shown that the lessor owned two distinct tracts in lot four north of the track, each of four acres, so that the description would apply to each, parol evidence would have been admissible to show the intention of the parties. "If a man levies a fine of the Manor of Soure or of the Manor of Dirtleby, and in truth there is the Manor of North Soure and South Soure or Great Dirtleby and Little Dirtleby, in this case issue may be taken *dehors* which manor the conusor intended to pass." (*Altham's Case*, 8 Coke's Rep. [Eng.],

155.) These principles seem to indicate that the description is not upon its face void for uncertainty. If certain parol evidence would directly ascertain the description, there can be little doubt that when parol evidence, as in this case, first discloses the facts which render the description uncertain, such uncertainty arising by parol may be removed in like manner. As between the parties to a conveyance, the conveyance should not be permitted to fail for uncertainty in description, except as a matter of necessity; and we think it is established by the numerous adjudications bearing upon the subject that whatever description may be agreed upon by the parties as designating a definite tract agreed upon between them, is sufficient to bind the parties. Thus, such descriptions as "my farm," "barren island," and other general terms, understood by the parties to refer to a particular definite tract of land, have been held sufficient. In older states not favored by government surveys and recorded plats, as a matter of necessity such descriptions are resorted to, referring to monuments, recognized by the parties, but frequently not capable of being identified by others without resort to the acts or expressed intentions of the parties. Had there been any reference, however vague, in the lease to the demarcation resorted to by the parties, there could be no doubt that the proof of such demarcation might be shown by parol. From the terms of this lease it does appear that they had in mind a particular tract of four acres, and we see no reason why extrinsic evidence to identify the tract was inadmissible. It must be remembered, however, that we are discussing this question only as it affects the immediate parties to the instrument, or persons representing such parties. Did the case involve a question of the effect of recording the lease, as notice to third persons, or questions similar to that, entirely different considerations would control the decision, and a different conclusion might be reached.

The plaintiff in error also seeks to avoid responsibility

upon the ground that the defendants in error, the plaintiffs below, knew when they took the assignment from Farthing that a portion of the land was in the possession of the gravel company. This is no defense to an action for breach of covenant. If the lease was valid, Farthing had a right of action against the lessor for his breach of contract. By the assignment his rights were transferred to the plaintiffs. They claim no other rights.

A question is raised as to the admission of certain evidence to prove damages. It will be remembered that the lease expressly granted the privilege of removing sand from the land. The petition alleges that plaintiffs carried on the business of shipping sand to adjoining cities and selling the same, and prepared the ground for such business, and that by defendant's acts the profits of such business were greatly diminished, all to defendant's knowledge. The evidence objected to related to the cost of mining sand, the value of sand on the track, the profits per car, and the number of car loads per acre. Upon this subject the court instructed the jury that the measure of damages would be the value of occupying the land and taking away the sand for the period of five years. No exception was taken to this instruction, and under the familiar rule in *Hadley v. Baxendale*, 9 Exch. [Eng.], 341, the instruction was correct. The lease being made for the purpose of removing sand, the damages arising by reason of plaintiffs not being permitted to remove the sand must have been in the contemplation of the parties, and the evidence objected to was all material for the purpose of enabling the jury to determine the value of the occupancy of the land for that purpose. (Sedgwick, Damages, secs. 987, 1022.)

There is in the record the usual assignment that the verdict is not sustained by the evidence. We are not able to understand all the evidence very perfectly. At the commencement of the trial a plat was introduced that the witnesses constantly referred to, sometimes by words indicating

points upon the plat which can be identified, but more frequently by the words "here" and "there," accompanying these words apparently by indicating in the presence of the jury the points referred to. The jury and the trial judge observed these witnesses, and by the aid of such indications undoubtedly were enabled to understand points in the evidence which are wholly unintelligible upon the written record. In this condition of the record we cannot say that there was not evidence to support the verdict, the identity of the land leased and the relative possessions of the plaintiffs and the gravel company being the points upon which it is urged that the evidence was insufficient.

AFFIRMED.

38 687  
145 837

MARY J. HOUSTON ET AL. V. JOHN GRAN ET AL.

FILED JANUARY 3, 1894. No. 5041.

1. **Damages Resulting from Sale of Liquors: INSTRUCTIONS.** Under the "civil damage act," the fact that minor children are able to support themselves, and had done so prior to the death of the father, is a proper fact for the jury to consider in ascertaining the amount of damages to be allowed; but it is error to instruct the jury that to the extent that a child had in the past supported himself, the law precludes any recovery; the duty to support and the probability of future support, as well as the fact of past support, being elements for consideration.
2. ———: ———. In such an action the fact that the deceased in his lifetime accumulated property which, upon his death, went to the plaintiffs, does not go to mitigate damages, but rather to enhance them, and an instruction from which the jury would infer that such facts go in mitigation of damages is misleading and erroneous.
3. ———: ———: **EVIDENCE.** The fact that a saloon-keeper, prior to the sales complained of in a civil damage case, had instructed his servants not to sell liquor to the deceased, is inadmissible in evidence as not tending to prove that such sales were not in fact made.

ERROR from the district court of Lancaster county. Tried below before FIELD, J.

The facts are stated in the opinion.

*Lamb, Ricketts & Wilson*, for plaintiffs in error:

The fact that the deceased may have left some estate which contributes to the support of his family, and the fact that some members of his family have the ability and are capable in whole or in part of supporting themselves, will not reduce but rather increase the amount the plaintiffs should recover, and an instruction by the trial court to the contrary is error. (Sec. 15, ch. 50, Comp. Stats.; *Roose v. Perkins*, 9 Neb., 313; *Hackett v. Smelsley*, 77 Ill., 120; *Schneider v. Hosier*, 21 O. St., 112; *Thill v. Polman*, 41 N. W. Rep. [Ia.], 385.)

*G. M. Lambertson, contra*, cited: *Kerkow v. Bauer*, 15 Neb., 150; *Warwick v. Rounds*, 17 Neb., 416.

IRVINE, C.

Mary J. Houston, as widow, and the other plaintiffs in error, as minor children of James H. Houston, deceased, brought this action against John Gran, a saloon-keeper, and the sureties upon his bond, charging the sale of liquor by Gran to Houston, causing intoxication, in consequence of which intoxication Houston wandered upon the tracks of a railroad and was killed. There was a verdict and judgment for the plaintiffs in error for \$100. Many errors are assigned, of which we shall notice only two.

The court gave the following instruction upon the measure of damages:

“If you should find in favor of the plaintiffs in determining the amount of damages, if any you find the plaintiffs entitled to, you are at liberty to consider the habits, health, and the estate of the husband of the plaintiff prior to his

death, and the profits of his labor, if any, and the condition of his family at such time, as elements in deciding what the amount of the injury or damages may have been from the loss of such support; but in no case of this kind can the amount of damages exceed the value of such support, whatever may be the necessities of such family. If you find for the plaintiffs, and that the plaintiffs have lost the means of support to them by the death of the father, in assessing your damages at the actual loss of support to the plaintiffs, if you find the deceased was a strong, healthy man, you can estimate his expectancy of life upon the Carlisle table, which may have been introduced in evidence before you. This action being brought for loss of means of support which would have been supplied the plaintiffs by the deceased father and husband had he lived, the extent of such loss is to be considered and measured by you by the kind, character, and value of the services of the deceased to plaintiffs in his vocation or business when living; and as to the value of the loss of such means of support to the minor children of the deceased, it will depend in some degree upon the age and ability of the different children to support themselves, bearing in mind that you cannot take into consideration and assess remote, speculative, or exemplary and punitive damages. If you should find from the evidence that any of the children have the ability and are capable of wholly or in part supporting themselves, and did so prior to the death of the father, then as to the amount of such support such child could not recover. If you should find that the deceased left property to the plaintiffs, which wholly or in part goes to their support, then you should take such fact in consideration in determining the amount of damages, if any, the plaintiffs are entitled to."

The last two sentences of this instruction are objectionable. By one of these the jury was told that if any of the children had the ability and were capable of wholly or in part supporting themselves, and did so prior to the death

- 4 of the father, then as to the amount of such support such child should not recover. This language was too strong. In ascertaining the damages, to-wit, the loss of support, the fact that any of the children did, as a matter of fact, support themselves, or assist in so doing, was a proper fact for the consideration of the jury as tending to show to what extent damage was caused by the death of the father. But the mere fact that a child was able to support himself, and did so, would not exclude all right to recover on behalf of that child. The right to support, and the probability of future support, as well as the fact of past support, were elements for consideration, and the most that could properly be said was that the fact that a child had habitually supported himself was an element to be considered by the jury in ascertaining the damages from the father's death. By the last sentence of the instruction the jury was told that if they should find that the deceased left property to the plaintiffs, which, wholly or in part, went to their support, then they should take such fact in consideration in determining the amount of damages. The plain inference from this language, framed as it was and in the connection it appeared, was that the fact the father and husband left an estate should mitigate damages. The contrary is true. If a man deserts his family, leaving nothing to their support, and has accumulated no property, those facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrious and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to his family by reason of his untimely death is enhanced by those very facts. The estate left to the family would presumably be not less productive in the hands of the husband and father himself had he lived, and its income would inure to the benefit of the fam-

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ily as much had he lived as after his death. While this instruction does not directly state a contrary rule, its clear influence upon the jury must have been to lead them to infer that the contrary rule existed.

By the ninth instruction the jury was told that it was proper for them to consider in determining whether or not the defendant Gran, or his employes, did furnish intoxicating liquors, certain evidence tending to show that Gran had directed his servants not to sell intoxicants to the deceased. It is true this language was qualified by the further instruction that Gran was nevertheless responsible for acts performed by his servants, although contrary to his instructions; but we think the court erred in admitting evidence of these instructions and in directing the jury that this evidence should be considered. We do not think the fact that Gran had directed his servants not to sell Houston intoxicants tends at all towards proving the issue in the case, that is, the fact of such sale. Were exemplary damages allowed the evidence might have been material in mitigation of damages; but under our rule of conferring compensation alone Gran was liable for such compensation for his servants' acts, although done against his instructions, and the giving of those instructions does not tend to disprove the fact of the sale.

REVERSED AND REMANDED.

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JAMES F. SHEEHY, APPELLANT, V. HUGH FULTON ET  
AL., APPELLEES.

FILED JANUARY 3, 1894. No. 5260.

1. **Mechanics' Liens: VENDORS' LIENS: PRIORITIES.** The vendor in an executory contract for the sale of land subjects his estate in the property to a mechanic's lien for improvements

38	691
38	656
38	691
44	821
38	691
49	686

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erected thereon by the vendee where his agreement with the vendee is of such character as to require the construction of the building and to constitute the vendee his agent in such construction.

2. **Persons claiming mechanics' liens** are not in such cases restricted by the terms of the written contract of sale, but may, by parol evidence, establish the true terms of the contract.
3. **Statute of Frauds: MEMORANDUM.** WHERE A VERBAL PROMISE is made, upon sufficient consideration, to answer for the debt of another, and subsequently a memorandum is executed sufficient to answer the requirements of the statute of frauds, such promise may be enforced, although no new consideration passes upon the execution of the written memorandum.

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

The opinion contains a statement of the case.

*Marquett, Deweese & Hall*, for appellant:

The plaintiff is entitled to a prior lien for the balance of his purchase money under and by virtue of the terms of the contract of sale. (*Neil v. McKinney*, 11 O. St., 58; *Zeigler, Baker & Co.'s Appeal*, 69 Pa. St., 471; *Logan v. Taylor*, 20 Ia., 297; *Wilkerson v. Rust*, 57 Ind., 172; *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Henderson v. Connelly*, 123 Ill., 98; *Hickox v. Greenwood*, 94 Ill., 266.)

No attempt is made to reform the contract. The evidence admitted attempting to show there was a verbal agreement that a building should be erected was incompetent. (*Bast v. First Nat. Bank of Ashland*, 101 U. S., 93; *Martin v. Berens*, 67 Pa. St., 459; *Barnhart v. Riddle*, 29 Pa. St., 96; 1 Greenleaf, Evidence, sec. 275; *First Nat. Bank of St. Paul v. Nat. Marine Bank of St. Paul*, 20 Minn., 63.)

*F. A. Boehmer* and *W. A. Williams*, for appellee Sterling P. Smith *et al.*:

The decree of the court below giving the mechanics

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prior liens is correct. (*Bohn Mfg. Co. v. Kountze*, 30 Neb., 719; *Henderson v. Connelly*, 123 Ill., 98; *Hill v. Gill*, 42 N. W. Rep. [Minn.], 294; 2 Jones, Liens, secs. 1255, 1256, and cases cited.)

*Talbot & Bryan* and *T. S. Allen*, for appellee Pomeroy Coal Company:

The promise of plaintiff to pay for materials was an original promise and not within the statute of frauds. (*Waters v. Shafer*, 25 Neb., 225; *Lindsey v. Heaton*, 27 Neb., 668.)

*Stevens, Love, Cochran & Teeters*, for other appellees.

IRVINE, C.

Upon September 25, 1890, the plaintiff contracted to sell a lot in the city of Lincoln to the defendant Fulton, \$5 of the purchase price being paid in cash, and the remainder, \$3,495, to be paid November 1, 1890. The construction of a building upon the lot was begun by Fulton a few days after the execution of this contract. This suit was brought by the plaintiff to foreclose his lien for the purchase money. A number of defendants set up mechanics' liens growing out of the performance of labor and furnishing of material for the building. The decree of the district court established these liens as prior to the plaintiff's lien for the unpaid purchase money. The principal controversy is as to the propriety of the decree in so subordinating the vendor's lien to the mechanics' liens. The mechanics' lienors, to support the decree, rely upon the doctrine of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719. The plaintiff contends, first, that no agreement charging the owner of the fee appears in the written contract of sale, and that parol evidence was inadmissible to establish such agreement; second, that the evidence admitted was insufficient to show such an agreement.

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As to the first contention, it is to be observed that the controversy here is not between the parties to the written contract. The lienors, being strangers to that contract, are not bound by the terms of the writing; but they are at liberty to enforce the real understanding and contract between the parties, the question being not whether there was an agreement between the vendor and vendee capable of enforcement between them, but whether the vendor by his acts had constituted himself a principal in the construction of the building and so charged his estate in the land.

As a preliminary to a consideration of the other branch of the question, that is, the sufficiency of the evidence to bring the case within the rule of *Bohn Mfg. Co. v. Kountze*, we think it is proper to say that in some instances that rule seems to have been misunderstood. An impression seems to have been created that the general effect of *Bohn Mfg. Co. v. Kountze*, 30 Neb., 719, and *Millsap v. Ball*, 30 Neb., 728, was to charge the vendor's estate in every case where by the nature of his contract or otherwise he has knowingly permitted the erection of a building by the vendee upon the land sold. A proper understanding of these cases leads to no such conclusion. The true rule is well stated in the case of *Pickens v. Plattsmouth Investment Co.*, 37 Neb., 272, as follows: "By this it was not held that where the owner of the land sells it and simply takes back a mortgage for the purchase price without in any way becoming a party to a contract for the erection of improvements, that one who furnishes materials or labor upon a contract with the vendee alone can assert thereon a lien superior to that of the said mortgage duly recorded. Quite to the contrary it has been recently held by this court in *Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207, where one furnished money to build a house for which he took a mortgage upon the premises whereon the erection was to be made, that the record of such mortgage gave a priority to the rights of material-men and mechanics who began to con-

fer. value upon the mortgaged property after the record of the mortgage. To subject a vendor's rights in the subject-matter of the sale to the claim of a mechanic's lienor, it must appear, that, with respect to the value conferred by the labor or material of such lienor, there was a privity of contract through the vendee between the vendor and such lienor. This privity will not be implied from the mere fact that the mechanic's lienor, upon the faith of a contract between himself and such vendee, furnished labor or material. It must be established by the proofs, or as fairly inferable from the facts as any other independent fact or proposition." The real question in this case, then, was whether or not such a privity had been established here between lienor and vendor under the rule as above stated. Upon this point there was evidence tending to show that when the contract of sale was made it was understood between the parties that the building should be erected; that the purchase price of the land was to be paid out of the proceeds of a loan which had been negotiated or which it was understood could be made upon the security of the property, but that the loan could not be consummated until the excavations of the building were made and the foundations were in. It was for these reasons that a nominal payment of \$5 was accepted, and that the whole of the remainder of the purchase money was to be paid November 1, it being understood that at that time the building should have advanced far enough to permit the consummation of the loan. There was also evidence tending to show that the vendor endeavored to have the vendee substitute other contractors for those who were performing the work because the latter were proceeding so slowly that a completion of the transaction could not be had within the stipulated time. There was also some evidence tending to show that the vendor exercised some control or direction over the building operations, but this evidence is of an uncertain character and leaves it very doubtful as to whether the vendor intended

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more in these matters than to prevent the vendee from encroaching upon other land of the vendor and to advise the vendee in some particulars. Such evidence is, therefore, of very little weight; but the evidence already adverted to, if believed, would lead to the conclusion that the transaction was a joint arrangement between vendor and vendee whereby a building should be erected from the proceeds of a loan obtained by the vendee, and out of the proceeds of the same loan the vendor should receive the purchase money of the lot. When one sells land to another and places that other in possession, in the absence of any restrictive covenants there is always an implied license that the vendee may make improvements on the land. The expression of direct authority to do so, independent of other circumstances, would not charge the vendor's estate; but, accepting the evidence already referred to, there was in this case not merely an implied or expressed permission to construct the building, but a distinct arrangement between the parties that the building should be constructed, and this, so far as the vendor was concerned, was for the purpose of obtaining funds out of which he should be paid for the land. While the case is near the border line, we think these facts were sufficient to sustain the trial court in finding that the vendor had established the vendee as his agent in the building operations sufficiently to charge the vendor's estate with the burden of mechanics' liens arising out of such construction. Indeed, the case in this view would be closely analogous to the case of *Millsap v. Ball*, *supra*. We conclude, therefore, that the court did not err in admitting parol testimony as to this arrangement, and that its findings are supported by the evidence.

Complaint is made because of the court's entering a personal judgment against the plaintiff on the claim of the Pomeroy Coal Company. Upon this claim there is evidence tending to show that the Pomeroy Coal Company refused to extend credit to the vendee for certain materials

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which he desired to purchase for the foundation of the building; that the vendor then went with the vendee to the agent of the coal company and told him to furnish the material as it was going upon his (the vendor's) land, and that "he would protect" the coal company for the material. Subsequently, and after the material was furnished, the vendor signed a written instrument whereby he agreed "to protect Pomeroy Coal Company in case they have to take a lien for stone, lime, and sand sold to H. Fulton." It is claimed that this portion of the agreement was fraudulently inserted after it was signed by the vendor; but we think the evidence justified the trial court in finding that such was not the fact. Taking the plaintiff's evidence upon this point, it would appear that when he signed the agreement it was left incomplete, in order that the correct description of the property might be inserted, and that he signed some distance below the part already written, in order that this might be filled in. In view of the relations of the vendor to the contractors already referred to it is probable that in any view of the case the agreement to pay the Pomeroy Coal Company must be considered an independent and not a collateral promise. Still, viewed as a collateral promise, the memorandum satisfies the statute of frauds. It is said that there was no consideration for the written memorandum. The consideration for the promise was the original sale and delivery of the material; and it is too well established to justify us in referring to authorities that the statute of frauds relates only to the form of evidence, and a writing made after the transaction, if otherwise sufficient, renders such promise enforceable, although no new consideration passes.

JUDGMENT AFFIRMED.

## STATE OF NEBRASKA V. JOHN E. HILL ET AL.

FILED JANUARY 3, 1894. No. 6407.

**Action on Bond of State Treasurer: VENUE: CONVERSION.**

Suit was brought in the district court of Douglas county upon the bond of a former state treasurer. Some of the sureties upon the bond resided in Douglas county and were there served with summons, and summonses were issued and served upon the other parties elsewhere. The petition alleged, first, the failure and refusal of the treasurer to account for and pay over to his successor a certain sum of money; second, the loaning to and deposit in the C. Bank, in Lancaster county, of a similar sum; third, the loaning to and deposit in the M. Bank, in Douglas county, of a certain sum; fourth, the loaning to and deposit in the U. S. Bank, in Douglas county, of a still further sum. Judgment was asked for the amount averred not to have been paid over, and averred to have been deposited in the C. Bank. *Held*, (1) that section 174 of the revenue law applies only to proceedings for the purpose of distributing revenues upon their collection to the proper funds, and not to such suits as that at bar; (2) that the proceeding was one upon an official bond or undertaking of a public officer and must be brought in the county where the cause or some part thereof arose; (3) that it was the duty of the treasurer to account for and pay over moneys in his hands at the close of his term of office to his successor in the county where the seat of government is located, and that an action for failing to do so must be brought in that county; (4) that it was the duty of the treasurer to keep the moneys of the state in the treasury at the seat of government, except as he should disburse them or otherwise dispose of them as provided by law; that a conversion took place upon his removal of moneys from the treasury with the intention of making an unlawful use of them by depositing them in the bank, and that the cause of action for such conversion arose upon his removal of the moneys from the treasury, and not upon their deposit.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

*George H. Hastings, Attorney General, and E. Wakeley,*  
for the state:

38	698
47	480
47	509
47	526
38	698
51	799
38	698
62	780

By the amended petition four breaches are alleged: First, the failure to pay over the sum of \$236,361.60; second, the deposit in and loan to the Capital National Bank of Lincoln, in Lancaster county, of \$236,361.60 and over; third, the deposit in and loan to the Merchants National Bank, in Douglas county, of \$80,510 and over; fourth, the deposit in and loan to the United States National Bank, in Douglas county, of \$159,748 and over. Therefore the cause of action did not arise in any particular county. The facts alleged constituted a conversion for which the state can recover, and the action "must be brought in the county in which the defendants, or some of the defendants reside, or may be summoned," and need not be brought in the county where the officer is elected and performs his official duty. (*McNee v. Sewell*, 14 Neb., 532; *State v. Keim*, 8 Neb., 63; *First Nat. Bank v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Seward County v. Cattle*, 14 Neb., 144; *Bank v. Lanier*, 11 Wall. [U. S.], 369, 375; *Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 94, 100; *Southern Loan Co. v. Morris*, 2 Barr [Pa.], 175; *Swartwout v. Mechanics Bank*, New York, 5 Denio [N. Y.], 555; Morse, Banking, sec. 289.)

*J. H. Broady*, for defendant in error John E. Hill:

Suit being on the official bond of the state treasurer, is covered by section 54 of the Code, and cannot be brought in Douglas county, unless the cause of action arose there. (Sec. 54, Code; *Clay v. Hoysradt*, 8 Kan., 80, 81.)

The petition does not show that any part of the cause of action arose in Douglas county, but on the contrary shows that all thereof arose in Lancaster county. The state treasurer must reside and keep his office at the seat of government, and if the taking of the public moneys from his office for deposit in banks was a conversion, the cause arose when, at his office at the capital, he removed it with intent to put it in a bank. Even if the depositing of public money in

banks be held a violation of official duty, there can be no cause of action against the treasurer for conversion, unless it appears that he failed to put it back into the treasury. (Constitution, sec. 1, art. 5; Con. Stats., sec. 3091; *State v. Baetz*, 44 Wis., 624; *Perley v. Muskegon County*, 32 Mich., 132.)

Utilizing banks in keeping the money of the state violated no law, nor duty of the treasurer, but was the proper thing to do; because it was the safest way to keep it, and was justified on the highest grounds of public policy. (*State v. McFetridge*, 54 N. W. Rep. [Wis.], 1.)

*T. M. Marquett, John H. Ames, Griggs, Rinaker & Bibb, and W. Q. Bell*, for bondsmen, filed printed arguments upon the same propositions discussed in brief of defendant Hill.

IRVINE, C.

John E. Hill was the treasurer of the state of Nebraska for the term ending in January, 1893. The other defendants herein were alleged in the petition to be the sureties upon his bond, which was conditioned that he should well and truly in all things perform the duties of his office during the continuance of his term as provided by law. This action was brought upon the bond in the district court of Douglas county, where some of the sureties resided, and the petition charges as breaches of the bond, substantially, as follows: That at the time of entering upon the duties of his office Hill had in his possession \$1,524,554.74, received and collected as the moneys of the state of Nebraska, held as such, and belonging to the state, and that thereafter during his term Hill received moneys of the state, and that the said sums amounted to \$4,200,834.50, making in all \$5,725,389.24; that out of said moneys he paid and disbursed divers sums for lawful purposes, but that at the end of his term, when he surrendered his office to his successor, there still remained in his possession and control

\$1,144,556.42, which it was his duty to pay over and deliver to his successor; that he failed and refused to pay over said moneys, except that, as plaintiff is informed, he did pay over some small sums of money, the amount of which is unknown to plaintiff, and delivered to his successor sundry certificates of deposit in certain banks or choses in action which he in some manner induced his successor to accept in place of money, amounting in the aggregate to the sum last mentioned; that Hill's successor has since received, by means of such certificates or choses in action, certain sums, the amount of which is unknown to the plaintiff, but that Hill failed and refused to pay over, disburse, or account for the sum of \$236,364.60 and more, whereby the state has sustained damages in the sum last mentioned. The defendants residing in Douglas county were served with summons there, and the other defendants were served in the counties of their respective residences. The defendants not residing in Douglas county, by several different instruments, entered special appearances and objected to the jurisdiction of the court. Subsequently, by leave of court, an amended petition was filed, which, so far as it alleges the breach complained of in the original petition, is substantially similar thereto, except that it alleges that the sum which Hill failed and refused to pay was \$236,361.60. The amended petition alleges a further breach of the bond by charging that Hill, during his term of office, deposited in and loaned to the Capital National Bank of Lincoln, located and doing business in Lancaster county, \$236,361.60, thereby converting the said moneys to his own use; and for a further breach, that he also deposited in and loaned to the Merchants National Bank of Omaha, located and doing business in Douglas county, \$80,510 and over; and for a still further breach, that he deposited in and loaned to the United States National Bank of Omaha, located in and doing business in Douglas county, \$159,748 and over. The amended petition closes with an allegation that by

reason of the premises the plaintiff has sustained damages in the sum of \$236,364.60, and prays judgment for that amount. The defendants, non-residents of Douglas county, renewed their special appearance and objections to the jurisdiction of the court. While the objections of these defendants are set forth in different language, they are all to the effect that the petition shows upon its face that the action is one within section 54 of the Code of Civil Procedure, and that the transactions complained of occurred in Lancaster county and not in Douglas. The district court sustained these objections and dismissed the action for want of jurisdiction.

The state prosecuted error, assigning numerous errors, all of which, however, present the single question as to whether or not the district court erred in holding that it had no jurisdiction of the action.

The statutes which it is claimed relate to the subject are sections 54 and 60 of the Code of Civil Procedure, and section 174 of the revenue act. Sections 54 and 60 are in title 4 of the Code relating to counties in which actions are to be brought. By section 54 it is provided: "Actions for the following causes must be brought in the county where the cause or some part thereof arose. \* \* \* Second—An action against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty. Third—An action on the official bond or undertaking of a public officer." Sections 51 to 59, inclusive, all relate to the places where different classes of actions therein specified are to be brought. Section 60 provides: "Every other action must be brought in the county in which the defendant, or some of the defendants, resides, or may be summoned." The first portion of section 174 of the revenue act is as follows: "When suit is instituted in behalf of the state, it may be in any court of record in this state having jurisdiction of the amount; and process may be directed to any county in the state."

Which of these statutes applies to the case at bar? It is urged by plaintiff in error that the case is to be governed by section 174 of the revenue act, as being a special provision relating to this class of actions. That section must be taken with its context. The title of the act is, "An act to provide a system of revenue." The act, in its different parts, relates to the listing and assessment of property for taxation; the levying and collecting of taxes, including the seizure and sale of property for taxes; the distribution of taxes, when collected, to the proper funds and to the proper custodians. The custody of such funds, their disbursement, and the accounting therefor by officers charged with their custody and disbursement, are subjects neither within the title nor the provisions of the act, but are provided for in other statutes. The sections immediately preceding section 174 provide for the settlement by treasurers and other collectors of taxes with the custodians of the funds for the supply of which the taxes were levied and collected, and for the payment of taxes, when collected, to such custodians. Section 173 provides for a suit by the auditor against county treasurers for failure to make settlements on account of taxes collected for the state. Then follows the provision quoted from section 174. The remainder of section 174 provides for summary procedure against officers or persons "whose duty it is to collect, receive, settle for, or pay over any revenues of the state." Section 175 extends the remedy by suit to cities, towns, villages, etc., against treasurers or other officers collecting or receiving funds for their use. We think it is manifest, from the purpose of the whole act and the subject-matter of its immediate context, that section 174 relates only to suits for the purpose of getting the revenue out of the hands of the collectors into the treasury and not to actions based upon the misappropriation of funds after they have reached the treasury. An additional reason for so construing the section is that to extend it further would inject into the act

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State v. Hill.

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a subject not within its title and expose it to the constitutional objections discussed in *Holmberg v. Hauck*, 16 Neb., 337; *Foxworthy v. City of Hastings*, 23 Neb., 772; *Touzalín v. City of Omaha*, 25 Neb., 817; *Trumble v. Trumble*, 37 Neb., 340.

As between section 54 and section 60, it would seem clear that the action was one of those designated in section 54, and that, therefore, that section would govern rather than section 60, which is simply a general provision meant to apply to such cases as should not fall within any of the preceding special provisions. But it is said that, in so far as the action is based upon the failure of Hill to account for and pay to his successor, the breach is purely negative in its character, and cannot be said to be at all localized; that the cause of action did not, therefore, arise at any particular place, and that the case must fall within the general provision of section 60. In support of this proposition it is argued that a petition merely alleging the failure to account and pay over in Lancaster county would be demurrable, because it would not appear that there was not an accounting and payment elsewhere. This may be true. An accounting and payment elsewhere than at the capital might protect the state and discharge the treasurer from liability, but we entertain no doubt that it was his duty to account and pay over at the capital, and that the state could insist upon his doing so there and not elsewhere. By section 1, article 5, of the constitution it is provided that the treasurer shall reside at the seat of government during his term of office and keep the proper records, books, and papers there. It is only at the capital, therefore, that the books and accounts could rightfully be for the purpose of an accounting. This constitutional provision is re-enforced by article 4 of chapter 83, Compiled Statutes, wherein the treasurer is required to reside, and keep his office at the seat of government, to account for and pay over all moneys received by him as such treasurer to

his successor in office, and deliver all books, vouchers, and effects of office to him. This could only be done where such office, books, and vouchers are kept. The breach charged, therefore, was the failure to do an act which the law required him to do at a particular place, and the case falls squarely within the rule established in *McNee v. Sewell*, 14 Neb., 532. In that case the action was upon the bond of the sheriff of Thayer county, who had neglected to return executions issued out of the district court of Lancaster county. The suit was held to have been rightfully brought in Lancaster county, because the judgments were recovered and executions there issued, and the executions should have been there returned. In other words, the breach of the bond was the failure to do what the law required to be done in Lancaster county, precisely the same kind of a breach as is here averred, by reason of the failure to pay over the money.

The case, then, falls within section 54 of the Code of Civil Procedure, and the question thus arises, did the cause of action, or any part thereof, arise in Douglas county? For the reasons just stated the cause of action, so far as it is based upon the failure of Hill to account for and pay over to his successor in office the moneys coming into his hands as treasurer, must be determined to have arisen in Lancaster county, where the seat of government is fixed. No other breach of the bond is alleged in the original petition. The amended petition added what is charged as three additional breaches: First, the deposit in the Capital National Bank of \$236,361.60 and over. It is clear that this does not state a cause of action, any part of which arose in Douglas county. Second, the deposit in the Merchants National Bank of Omaha of \$80,510 and over; and third, the deposit in the United States National Bank of Omaha of \$159,748 and over. If jurisdiction is vested in the district court of Douglas county it must be because of the averments of deposits in the two Omaha banks, and two

questions are presented upon this aspect of the case: (1) Do the averments of the Omaha deposits set forth facts constituting a cause of action upon the bond? (2) Do these averments show that part of the cause of action arose in Douglas county?

Upon examination of the original petition it is found that it averred a failure to pay over the amount of \$236,364.60, and judgment was asked for that amount. In the amended petition the amount stated is \$236,361.60, which is the same amount as the amended petition avers was deposited in the Capital National Bank of Lincoln. The prayer for judgment is still for \$236,364.60. It is also averred that Hill turned over to his successor and induced his successor to accept sundry certificates of deposit, upon which were realized certain sums of money unknown to plaintiff, but of the whole amount for which Hill was accountable, \$236,361.60 and more, remains unaccounted for. While, perhaps, under the Code the common law rule that pleadings are to be taken most strongly against the pleader may not retain all its original force, still pleadings must be construed reasonably; and it is not to be inferred that a pleader will omit averments manifestly to his advantage, or insert those manifestly to his disadvantage. It is a reasonable and almost necessary inference from the amended petition that the moneys deposited in the Omaha banks were eventually received by the state, and that the amount for which Hill failed to account was the amount deposited in the Capital National Bank. The state could suffer no damage and could recover nothing upon the bond by reason of the Omaha deposits if, before action brought, Hill had paid over to the state the money so deposited. The object of requiring bonds from officers is to have such bonds as security for damages sustained, and no cause of action arises upon such a bond because of a technical breach unaccompanied by damage. (*Commonwealth v. Reed*, 3 Bush [Ky.], 516; *Jones v. Biggs*, 1 Jones' Law [N. Car.], 364;

*State v. Baetz*, 44 Wis., 624.) Possibly a petition simply alleging the deposit without averring non-payment might state a cause of action; but should it aver in terms, as it does here by plain inference, that no loss whatever had resulted, no cause of action would be stated.

Finally, assuming that these averments set out actionable breaches of the bond, did the cause of action, or any part thereof, arise in Douglas county? From the statutes already quoted and from the decisions of this court (*State v. Keim*, 8 Neb., 63; *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431; *Cedar County v. Jenal*, 14 Neb., 254; *Wayne County v. Bressler*, 32 Neb., 818), it is clear that it is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where by recent statutes they are permitted to invest or deposit it, and then such investment or deposit must be made only in the manner provided by law. Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest it in any manner, or to deposit it. Assuming, then, that he took the money from the treasury and deposited it in the Omaha banks and the state had not received it back, when did the conversion take place? As stated by Alderson, B., in *Fouldes v. Willoughby*, 8 M. & W. [Eng.], 540, "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion," and, as said by Lord Abinger in the same case, "In order to constitute a conversion it is necessary either that the party taking the goods should intend some use to be made of them by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed, to the prejudice of the rightful owner," and, as stated in *McPartland v. Read*, 11 Allen [Mass.], 231, "Every tortious taking with intent to apply chattels to the use of the taker or some other person than the owner is a conversion." When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a

conversion and a cause of action accrued. Suppose, instead of depositing the money in Omaha, he had deposited it in New York or Chicago, could it be said that it was only upon the deposit of the money that a cause of action accrued, and that no suit would lie in this state? The wrong was done and completed, so far as the state was concerned, when the money was removed from its treasury at Lincoln. It is said there is nothing in the petition to show that the money had ever reached the treasury, but that it was probably money collected in Douglas county and turned over to the treasurer there. The answer to this is that there is nothing in the petition from which it can be inferred that the latter was the fact. It was the duty of the Douglas county treasurer to make a settlement and pay over the money in Lincoln. It is to be presumed that he did so there.

It is argued that section 124 of the Criminal Code makes it a crime to lend the state funds to any corporation or individual, and that the deposit of money in banks is lending money within the prohibition of this section. But it does not follow, because the depositing of money may constitute or be evidence of a crime, that the civil cause of action arose only upon that deposit. The same section makes it a crime to convert the money to his own use. As we have shown, the conversion took place in Lancaster county, and the civil cause of action arose upon the commission of the first offense and did not in anywise depend upon the commission of the second.

The case of *Clay v. Hoysradt*, 8 Kan., 74, is relied upon by the plaintiff in error. In that case suit was brought in Douglas county to enjoin the enforcement of certain judgments obtained before a justice of the peace in Leavenworth county in favor of Hoysradt against Clay, and which judgments, it was alleged, had been satisfied. It was held that the justice of the peace and constable being officers of Leavenworth county, and the illegal acts complained of

committed there, the case fell within the section of the Kansas Code, identical in language with section 54 of our Code, and that the cause of action arose in Leavenworth county, notwithstanding the fact that Hoysradt himself lived in Douglas county and was there served with summons. We cannot see how this case militates against the view we have taken. On the contrary, if it has any bearing upon this case, it rather tends to confirm our views. So, too, the case of *Fay v. Edmiston*, 28 Kan., 108, cannot be regarded as authority, because it is directly in conflict with the case of *McNee v. Sewell* already cited. We think the judgment of the district court was right and it should be

AFFIRMED.

MAXWELL, C. J., dissenting.

This is an action on behalf of the state of Nebraska to recover from the defendant, a former state treasurer, and his sureties, the sum of \$280,510. The action was brought in Douglas county, and each of the defendants objected to the jurisdiction of the court of that county; that the action was not brought in the proper county. Immediately after said objections were filed the state filed an amended petition, wherein it alleges: "Of the said moneys so received and held by the said John E. Hill as such state treasurer and belonging to the state of Nebraska, he, the said Hill, during his said last term of office, and after the execution and delivery of the said bond, unlawfully, and contrary to his duty as such state treasurer, deposited in and loaned to the Capital National Bank of Lincoln, Nebraska, located and doing business in the county of Lancaster, in the state of Nebraska, the aggregate sum of \$236,361.60 and over; and in the United States National Bank of Omaha, Nebraska, located and doing business in the county of Douglas, in the state of Nebraska, the aggregate sum of \$159,748 and over; and in the Merchants National Bank of Omaha, Nebraska,

located and doing business in the county of Douglas, in the state of Nebraska, the aggregate sum of \$80,510 and over, thereby converting said moneys to his own use. The said moneys were so deposited and loaned from time to time in sums less than the said aggregate sums, but the plaintiff is not informed, and has not the means of ascertaining, the precise dates and amounts of the said several sums making up the said aggregate, and cannot more particularly set forth the same." A notice was duly served on each of the defendants of said amendment. The objections to the jurisdiction were sustained by the court and the action dismissed for want of jurisdiction.

The sole question presented is the right to bring the action in Douglas county. Section 54 of the Code provides: "Actions for the following causes must be brought in the county where the cause, or some part thereof, arose: First—An action for the recovery of a fine, forfeiture, or penalty imposed by a statute; except that, when it is imposed for an offense committed on a river, or other stream of water, or road which is the boundary of two or more counties, the action may be brought in any county bordering on such river, water-course, or road, and opposite to the place where the offense was committed. Second—An action against a public officer, for an act done by him in virtue or under color of his office, or for a neglect of his official duty. Third—An action on the official bond or undertaking of a public officer." Now, where did the cause of action arise? If the allegations of the petition are true, the defendant Hill took the money of the state and, in the face of a direct prohibition in the statute, converted the same to his own use by depositing it in two banks in Omaha. Section 124 of the Criminal Code declares: "If any officer or other person charged with the collection, receipt, safe keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state or to any county, or precinct, organized city or village, or school district in the state, shall con-

vert to his own use, or to the use of any other person or persons, body-corporate, association or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall be thus converted, used, invested, loaned, or paid out as aforesaid, which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets, or effects of any kind as aforesaid, has been so embezzled." We were told on the argument by the attorneys for the defendants that this section was practically nullified and that no conviction had ever taken place on it. This may be true, but still it is the law of this state, as much so as that against larceny, robbery, or murder, and it is not in the power of this court to nullify it.

The above section is substantially the act of the Ohio legislature, approved April 12, 1858. (S. & C., 1610.)

This act was passed for the express purpose of prohibiting the loaning of the public funds. The experience of other states has been that the loaning of such funds tends to foster corruption in its worst forms by placing the surplus funds of the state in the hands of a few persons to be used for their personal benefit. These persons stand in with the public official, whoever he may be, and manage to keep on hand a much larger surplus than necessary, which is used for private gain. Prior to 1835 the surplus funds of the United States were kept in banks. The effect was found to be favoritism and corruption, which had a demoralizing effect upon not only party organization, but upon free government itself. The president in that year ordered the public funds withdrawn from the depositories and kept in the treasury. From that time till now the surplus funds of the United States, except in certain special cases, as where depositories are designated for certain purposes, are kept in the hands of the treasurer. It is true that a sub-treasury act was afterwards passed for the greater security of the public funds, and that they are now principally kept in the sub-treasury or some of its branches. Now, suppose the United States treasurer should loan the funds on his personal account and receive the interest thereon. He would be clearly guilty of converting the public funds to his own use. So far as I am aware, no attempt of that kind has ever been made. The statute of Nebraska places an absolute prohibition upon the loaning of public funds or depositing the same in a bank. Stronger language could not be used. The offense is declared to be embezzlement, and the punishment is fixed at not less than one nor more than twenty-one years' imprisonment in the penitentiary. But it is said that the treasurer is guilty of conversion by carrying the funds out of Lancaster county, and, therefore, that county is the only one where the action can be brought. The answer is, the prohibition of the statute is not against carrying the funds into another

county, but in loaning the same to one or more banks. The overt act, the loaning, took place in Douglas county, and there alone can a prosecution be had, and no prosecution for that offense could be instituted and maintained in Lancaster county.

In 1879 the legislature passed an act "to provide for the safe keeping of the moneys belonging to the state," the first three sections being as follows:

"Section 1. Whenever there shall have accumulated in the hands of the state treasurer moneys of the state to an amount in excess of the sum of \$100,000, the state treasurer shall, in writing, notify the governor and auditor of the state of that fact, and thereupon, within three days after the service of such notice, the governor, auditor, and treasurer shall meet and determine whether such excess is necessary to be retained in the treasury for the purpose of meeting the current demands thereon; and the record of said notification, and the proceedings of said meeting, and of its finding, shall be made and signed by each of such officers, and preserved in the office of the auditor, who shall act as the secretary of such meeting.

"Sec. 2. In case said officers shall find that said excess is not necessary to meet the current demands upon the treasury, the same shall be immediately invested in United States four per cent bonds, by the treasurer, who shall deposit the same in some safe deposit, to be designated by the governor, auditor, and treasurer, in writing, signed by them and made of record in the auditor's office, and there kept until it shall become necessary to convert the same into money, which necessity shall be determined and the record thereof kept in like manner as hereinbefore provided, and a statement of any such investment or sale under oath shall be published within ten days after the same is made, in some newspaper published at the capital, to be designated in writing by the governor. There shall also be published in the same paper a monthly statement, under oath, of the amount

of cash balance in the state treasury and of the amount invested as aforesaid.

“Sec. 3. Any officer charged with the duties hereinbefore mentioned who shall make or publish any false statement, or swear falsely in respect to any matter or thing, in respect to which a sworn statement is herein required, shall be deemed guilty of perjury, and shall be prosecuted and punished accordingly.” (Laws 1879, 152.)

This act was amended in 1891, the first two sections being as follows :

“Section 1. The state treasurer shall deposit, and at all times keep in deposit for safe keeping, in the state or national banks, or some of them doing business in the state, and of approved standing and responsibility, the amounts of money in his hands belonging to the several current funds in the state treasury, and any such bank may apply for the privilege of keeping on deposit such funds or some part thereof; all such deposits shall be subject to payment when demanded by the state treasurer on his check and by all banks receiving and holding such deposits as aforesaid, shall be required to pay, and shall pay, to the state for the privilege of holding any such deposit not less than three per cent per annum upon the amounts so deposited, as hereinafter provided, and subject also to such regulations as are imposed by law and the rule adopted by the state treasurer for receiving and holding such deposits.

“Sec. 2. The amount to be paid by any and all banks under the provisions of this act for the privilege of keeping public funds on deposit shall be computed on the average daily balances of the public moneys kept on deposit therewith, and shall be paid and credited to the state quarterly on the first days of January, April, July, and October of each and every year, and the treasurer shall require every such depositary to keep separate accounts of such several funds of the state as may be deposited, showing the name of each fund to which the same belongs and the amounts

and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such funds so held."

There is also a provision for designating the bank where deposits are to be made. The act did not take effect until the expiration of the term of the then treasurers.

This act, therefore, qualifies section 124 of the Criminal Code, and provides for the safe keeping of the public money, and is no doubt a valid law. If the treasurer, therefore, without such directions, deposits money in a bank, the statute declares him guilty of embezzlement, and it is a diversion of the money to his own use. This question was before the court in *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 431, and it was held that public money thus deposited was subject to garnishment for the private debt of the officer.

In *State v. Keim*, 8 Neb., 67, a former state treasurer had deposited \$2,000 in a bank at Falls City; and the bank failed, and an attempt was made to saddle the loss on the state. The court, by COBB, J., held that the treasurer and his sureties must make the loss good, as the depositing was in violation of law. It is said: "The depositing of the \$2,000 in the bank of the defendants was a loan in its legal effect. (*Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 100; *Southern Loan Co. v. Morris*, 2 Barr [Pa.], 175.) The state could not have made this loan in point of fact without the intervention of some officer or agent. No officer or agent of the state could make such loan or deposit without a violation of the law above referred to, which violation would render such officer or agent both personally and officially liable to the state for the money so loaned or deposited, while no such unauthorized act would bind the state." The same rule was adhered to in *Cedar County v. Jenal*, 14 Neb., 254,

and is a general rule. (*Seward County v. Cattle*, 14 Neb., 144; *Commercial Bank of Albany v. Hughes*, 17 Wend. [N. Y.], 94; *Swartwout v. Merchants Bank*, 5 Denio [N. Y.], 555; *Perley v. County of Muskegon*, 32 Mich., 132.)

Now, where did the cause of action arise? In my view, where the breach of the condition occurred. We are referred to the case of *Clay v. Hoysradt*, 8 Kan., 58-74, as establishing a different rule. In that case Hoysradt recovered three judgments against George P. Clay before a justice of the peace of Leavenworth county, Kansas. These were receipted for in full by Hoysradt upon the payment of but little more than one-half of the face of the judgments. After giving such receipt, Hoysradt, who seems to have been a resident of Douglas county, Kansas, caused an execution to be issued upon the judgments for the residue thereof and given to a constable of Leavenworth county, who levied upon property of Clay in that county. The action was brought against Hoysradt in Douglas county, and the justice by whom the judgments were rendered and constable were joined with him, and the court held properly, I think, that the action must be brought in the county where the acts were performed.

In *Fay v. Edmiston*, 28 Kan., 109, this question again came before the supreme court of that state. In that case Judge Valentine says: "Where the action is against the officer and his sureties upon his official bond, we should think that the action might properly be commenced in the county where the cause of action arose, that is, in the county where the breach of the bond was committed, and that the court from which the writ was issued would not have the sole and exclusive jurisdiction, even if it had jurisdiction at all." The same rule was applied in this court in the case of *McNee v. Sewell*, 14 Neb., 532. In that case McNee was sheriff of Thayer county and executions were issued on certain judgments against one Gray in the district

court of Lancaster county and sent to McNee as sheriff of Thayer county, who neglected to execute or return the same. Afterwards, proceedings in amercement were instituted against him in Lancaster county, and the court of that county found that he was liable and amerced him in the amount of each of the said executions; and this court held that the action was properly brought in Lancaster county, and that the sureties were liable on the judgment. The leading case in regard to local and transitory actions is *Mostyn v. Fabrigas*, 1 Cowp. [Eng.], 161, 1 Smith, Leading Cas. [6th Am. ed.], part 2, 934, where there is a very clear statement of the law in regard to actions that are local and transitory; and a fair deduction from the cases therein referred to shows that officers may be sued in the county where the alleged wrongful act was committed, unless the statute expressly requires it to be brought elsewhere. Stephen, in his work on Pleading, says that at common law the plaintiff "may lay the venue in the action in any county, and upon issue joined the venire issues into the county where the venue in the action is laid," but the "defendants were enabled to protect themselves from any inconvenience which they may apprehend" by showing that the cause of action arose wholly in the county to which it was proposed to change the venue. If, however, the plaintiff would undertake at the trial to give ample evidence that a part of the cause of action arose in the county where the venue was laid the venue could not be changed. (Steph., Pl. [4th Am. ed.], 290.) At common law, "actions against constables, headboroughs, church-wardens, and persons aiding and assisting them, are to be laid within the county where the injury complained of has been committed." (3 Phillips, Ev. [4th Am. ed.], 727\*.) At common law, therefore, the action was to be brought where the cause of action arose, and that is the case under our statute. Now, where did the cause of action arise in this case? If the allegations of the petition are true, the defendant

Hill, in violation of law, deposited in Omaha banks a very large amount of money belonging to the state. As declared by statute and the decisions of this court he thereby converted it to his own use. This was done in Douglas county and not in Lancaster county, and it is very clear that the district court of Lancaster county could have no jurisdiction of that embezzlement. The case, therefore, is clearly within the provisions of section 54 of the Code, and the action being rightly brought upon the official bond, all causes of action upon such bond may be included in the petition, as the case falls within the familiar rule that where jurisdiction is entertained for one purpose the court will entertain jurisdiction and render complete relief. (Story, Eq. Juris., sec. 64*k*, and cases cited.)

The title of the revenue law of 1879 is, "An act to provide a system of revenue." The third definition of the word given by Webster is "The annual produce of taxes, excise, customs, duties, rents, &c., which a nation or state collects and receives into the treasury for public use." The money in question is that of the state levied and collected from the taxpayers, but which the treasurer has wrongfully appropriated to his own use. In other words, it is a part of the revenue of the state, placed where the treasurer is reaping a private benefit from its use. As I understand the law, all matters which properly relate to the revenue of the state may be included in the act. If that is not so, then there is no power for any county, city, municipality, school district, or other subdivision of the state to sue for the wrongful conversion and misappropriation of its funds, because the prohibition applies to each of them equally with the state. But no one will contend for such a construction as that.

Section 174 provides: "When suit is instituted in behalf of the state, it may be in any court of record in this state having jurisdiction of the amount; and process may be directed to any county in the state. If any proceeding

against any officer or person whose duty it is to collect, receive, settle for, or pay over any of the revenues of the state, whether the proceeding be by suit on the bond of such officer or person, or otherwise, the court in which such proceeding is pending shall have power, in a summary way, to compel such officer or person to exhibit on oath a full and fair statement of all moneys by him collected or received, or which ought to be settled for or paid over, and to disclose all such matters and things as may be necessary to a full understanding of the case, and the court may, upon hearing, give judgment for such sum or sums of money as such officer or person is liable in law to pay. And if, in a suit upon the bond of any such officer or person, he or his sureties, or any of them, shall not for any reason be liable upon the bond, the court may, nevertheless, give judgment against such officer and such of his sureties as are liable, for the amount he or they may be liable to pay, without regard to the form of the actions or pleadings."

Section 175 provides that cities, towns, villages, or corporate authorities, or persons aggrieved, may prosecute suit against any treasurer or other officer collecting or receiving funds, for their use, by suit upon the bond of the treasurer, in any court of competent jurisdiction, whether the bond has been put in suit at the instance of the auditor or not. Cities, towns, villages, and other corporate authorities or persons, shall have the same rights in any suits or proceedings in their behalf as is provided in case of suits by or in behalf of the state.

These are special provisions which control general provisions. Under these provisions the state is expressly authorized to sue the treasurer in any county where service can be had. Would it not be a strange anomaly that a city, village, or other municipality—in other words, a small part of the people in their corporate capacity—may sue in any county where service can be obtained, but the state,

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the whole people in their corporate capacity, are restricted to one county? I do not so understand the law and cannot give my consent to so narrow a construction of the statute. If the facts stated in the amended petition are true, and for the purpose of the motion they are presumed to be so, it is very clear to my mind that the district court of Douglas county has jurisdiction, and that the judgment of the court below should be reversed and the cause remanded for trial.

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CHARLES GRAFF, APPELLANT, V. CHRISTIAN ACKERMAN, COUNTY TREASURER, APPELLEE.

FILED JANUARY 4, 1894. No. 6555.

1. **Taxation of Land Purchased from Government Before Issuance of Patent.** When land has been fully earned or paid for, so that the clerical act of issuing the patent only is required in order to invest the purchaser or donee with the full legal title thereto, the jurisdiction of the state attaches, and it is taxable like other property; but where the conditions of the purchase or donation have not been performed, and the general government continues to have such a beneficial interest therein as will justify it in withholding a patent, it is not taxable by the agencies of the state.
2. The case of *Edgington v. Cook*, 32 Neb., 551, overruled.

APPEAL from the district court of Cuming county.  
Heard below before NORRIS, J.

The opinion contains a statement of the case.

*George D. Meiklejohn* and *George G. Bowman*, for appellant:

The land in controversy is not subject to taxation by the state while the legal title thereto is in the United States

and held to secure unpaid purchase money not yet due. (*Van Brocklin v. Tennessee*, 117 U. S., 151; *Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *Kansas P. R. Co. v. Prescott*, 16 Wall. [U. S.], 603; *Union P. R. Co., v. McShane*, 22 Wall. [U. S.], 444; *White v. Burlington & M. R. R. Co.*, 5 Neb., 393; *Donovan v. Klope*, 6 Neb., 124.)

*George H. Hastings, Attorney General*, and *P. M. Moodie, contra*, cited: *Edgington v. Cook*, 32 Neb., 551.

POST, J.

This was an action by the appellant in the district court of Cuming county against the appellee as county treasurer to restrain the sale by the latter of the southwest quarter of section 17, town 24, range 7 east, in said county, for taxes assessed in the years 1892 and 1893. A demurrer was sustained to the petition, and judgment entered dismissing the action, whereupon an appeal was taken by the plaintiff to this court.

It appears from the petition that the property above described is a part of the territory recently included within the Omaha Indian reservation; that in pursuance of an act of congress approved August 7, 1882, a part of said reservation, including the tract above described, was surveyed, appraised, and offered for sale to actual settlers on the following terms, to-wit: one-third of the appraised price one year from the date of entry, one-third in two years thereafter, and one-third in three years thereafter, with interest at the rate of five per cent per annum. By said act it is provided that "in case of default in either of said payments, the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he may have made." It is further provided that "when purchasers shall have complied with the provisions of this act as to

payment, improvement, etc., proof thereof shall be received by the local land office at Neligh and patents issued as in case of public lands offered under the homestead and pre-emption acts." In the month of June, 1884, the plaintiff settled upon the premises described and made valuable and lasting improvements thereon; and in the month of July of said year, having fully complied with the conditions imposed by said act, he purchased said property from the United States on the terms above named, and has since said last named date continued to reside on and cultivate the same. In the years 1885, 1886, 1888, and 1890, congress, by supplemental acts, extended the time for the payment of the purchase price of said land, so that the first payment therefor will become due on the 1st day of December, 1894, and the balance in equal installments one and two years thereafter. By each of said supplemental acts the interest on the principal sum was required to be paid annually, and the plaintiff has paid in full all interest chargeable to him under the provisions of the several acts; but the principal sum is not due, and is wholly unpaid.

It is obvious from the foregoing statement that the title to the property above described was, at the time of the levy of the taxes in controversy, in the United States, and that the plaintiff has at most an equitable interest therein. It is true that the payment in full of the purchase price will invest him with the entire equitable title to the premises; but at present he is in effect a tenant in possession under a contract of purchase in which time is made the essence of the contract. His title, whether equitable or legal, depends upon the payment for the land, and until the performance of that condition the title remains in the United States. The settled rule in the state and federal courts is that where land has been fully earned or paid for, so that the clerical act of issuing the patent only is required in order to invest the purchaser or donee with the full legal title thereto, the jurisdiction of the state attaches and it is

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taxable like other property; but where the conditions of the donation or purchase have not been complied with, and the general government continues to have such a beneficial interest therein as will justify it in withholding a patent, it is not taxable by the state. (See *Union P. R. Co. v. McShane*, 22 Wall. [U. S.], 444; *Van Brocklin v. Tennessee*, 117 U. S., 151; *Wisconsin C. R. Co. v. Price County*, 133 U. S., 496; *White v. Burlington & M. R. R. Co.*, 5 Neb., 393; *Donovan v. Klope*, 6 Neb., 124.) In *Union P. R. Co. v. McShane* Justice Miller uses the following language:

“That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government, can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it. There is something to be done without which the company is not entitled to a patent. The case clearly is not within the rule which authorizes state taxation of lands, the title of which is in the United States.

“The reason of this rule is also fully applicable to this case. The United States retains the legal title by withholding the patent for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the lands for taxes. If such a sale could be made, it must be valid if the land is subject to taxation and the title would pass to the purchaser. If no such title could pass, then it is because the land is not liable to the tax; and the treasurers of the counties have no right to assess it for that purpose.”

In concluding the learned judge says: “Under these views we are of opinion that the state had no right to tax the lands for which the cost of surveying had not been paid, and for which no patent had been issued.”

We feel under especial obligation to recognize the rule thus stated, for the reason that the people of Nebraska, at

the time of its admission into the Union as a state, entered into a solemn compact with the general government by which it is provided that "no taxes shall be imposed by said state on lands or property therein belonging to, or which may hereafter be purchased by, the United States." (See Enabling Act, sec. 4.)

The only obstacle we have encountered in holding the property described to be exempt from taxation by the agencies of the state is the case of *Edgington v. Cook*, 32 Neb., 551. That was an original action to restrain the collection of taxes assessed against lands in Nance county within the limits of the former Pawnee Indian reservation. It appears that the terms of sale were substantially the same as those enumerated in the petition in this case; that the plaintiff therein had made payment of but one of the three equal installments of the purchase price, and was not at the time of the levy of the taxes in controversy entitled to a patent, the title being in the United States. It was held that the lands were taxable from the date of their purchase. It is conceded that that case is directly in point, and, if it is to be regarded as authority, is decisive of the present controversy. But in determining its value as a precedent it should be observed, first, that the court therein appear to have overlooked the case of *Donovan v. Klope*, *supra*, in which it is expressly held that lands purchased from the United States at private entry are not taxable until after payment in full of the purchase money, and that every step before that time taken by way of assessment or levy of taxes is void; second, the decision therein rests upon the authority of *Hagenbuck v. Reed*, 3 Neb., 17, which involved no question of the power to tax property belonging to the United States, but the right of the state to tax its own school lands held by individuals under contracts of purchase; and, third, the force of *Hagenbuck v. Reed* as authority is greatly impaired, if indeed it is not overruled, by subsequent decisions of this court. (See

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*Washington County v. Fletcher*, 12 Neb., 356.) The last named case recalls the controversy, as serious as amusing, between the court and the legislature, which grew out of the decision in *Hagenbuck v. Reed*. It was contended by the legislature that school lands which had been sold by the state on credit were not taxable until fully paid for, notwithstanding the holding of this court to the contrary; and by an act approved February 20, 1879, under a preamble stating that said lands "have not been and are not now taxable for any purpose whatever," provision was made for the refunding to purchasers of all money paid as taxes thereon. That act was upheld in *Washington County v. Fletcher*, apparently upon the ground that it was a legislative construction of prior acts inconsistent with *Hagenbuck v. Reed*. While the question of the soundness of the conclusion in the last named case is not now before us, that case is clearly not authority for the proposition asserted by the appellee in this. Since we concur without hesitation in holding that the lands in this case were not taxable at the time in question, it follows that the case of *Edgington v. Cook* cannot longer be accepted as authority. The judgment of the district court is reversed and the case remanded with instructions to enter a decree in accordance with the views herein expressed.

REVERSED.

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ELMA R. McLAUGHLIN, APPELLANT, v. EQUITABLE  
LIFE ASSURANCE SOCIETY, APPELLEE.

FILED JANUARY 4, 1894. No. 5424.

1. **Life Insurance Contracts.** In the absence of fraud or mistake all previous verbal understandings are merged in the written contract of insurance, which is conclusively presumed to

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contain the entire engagements of the parties with all the conditions of their fulfillment.

**2. Agreement to Issue Paid-up Policy: ANNUAL PREMIUMS.**

It was stipulated in a life insurance policy that in case of default of payment of the annual premium therein named, after the payment in full of three of such premiums, the insurance company would issue in favor of the beneficiary therein, a paid-up policy for as many parts of the amount insured as equaled the number of premiums paid, provided such policy should be surrendered duly receipted within six months from the date of such default. *Held*, That the surrender of the receipted policy within six months after default is a condition precedent to the right to demand paid-up insurance.

**3. Specific Performance of Contract to Issue Paid-up Policy.** The insured, having failed to surrender the policy until more than eleven months after default, is not entitled to paid-up insurance, and an action by the beneficiary to compel specific performance of the contract therefor by the insurance company was rightfully dismissed for want of equity, although the insured had paid three of the annual premiums previous to the default.

APPEAL from the district court of Douglas county.  
Heard below before SCOTT, J.

The opinion contains a statement of the case.

*Isaac Adams*, for appellant :

Appellant did not forfeit her right to paid-up insurance through failure to surrender to appellee her original policy within six months from date of default. Time was not made essential by the terms of the policy. (Waterman, Specific Performance, sec. 462; May, Insurance, secs. 342, 343; *Mutual Life Ins. Co. v. French*, 30 O. St., 240; *Tutt v. Covenant Mutual Life Ins. Co.*, 19 Mo. App., 677; *Northwestern Mutual Life Ins. Co. v. Little*, 56 Ind., 504; *Ohde v. Northwestern Life Ins. Co.*, 40 Ia., 357; *Symonds v. Northwestern Mutual Life Ins. Co.*, 23 Minn., 491; *Hull v. Northwestern Mutual Life Ins. Co.*, 39 Wis., 397; *Franklin Life Ins. Co. v. Wallace*, 93 Ind., 17; *Northwestern Mutual*

*Life Ins. Co. v. Fort's Admr.*, 82 Ky., 269; *St. Louis Mutual Life Ins. Co. v. Grigsby*, 19 Bush [Ky.], 310; *Eddy v. Phoenix Mutual Life Ins. Co.*, 65 N. H., 27.)

Appellant's default was not long continued. It is explained. It did not occasion any damage to appellee. The default does not therefore constitute laches. (May, Insurance, sec. 469; *Barnes v. McMurtry*, 29 Neb., 178; *Symonds v. Northwestern Mutual Life Ins. Co.*, 23 Minn., 499.)

Upon the payment of the third annual premium the contract for paid-up insurance became mutual and should be enforced. (*Chase v. Phoenix Mutual Life Ins. Co.*, 67 Me., 85; *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush [Ky.], 51; *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky., 403; *Southern Mutual Life Ins. Co. v. Montague*, 84 Ky., 653; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177; *Hexter v. United States Life Ins. Co.*, 15 S. W. Rep. [Ky.], 863; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 70; Waterman, Specific Performance, sec. 465; *Barnes v. McMurtry*, 29 Neb., 178; 2 Story, Equity, secs. 1314-1316.)

*Isaac E. Congdon, contra:*

The written contract supersedes prior statements made by the insurer. (*Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Mutual Benefit Life Ins. Co. v. Ruse*, 8 Ga., 534; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177; *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea [Tenn.], 488; *Mutual Life Ins. Co. v. Bratt*, 55 Md., 200; *Continental Life Ins. Co. v. Hamilton*, 41 O. St., 274; *Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S., 252; *Mobile Life Ins. Co. v. Pruett*, 74 Ala., 487.)

The time of the surrender of the policy is of the essence of the contract. (*Sheerer v. Manhattan Life Ins. Co.*, 20

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Fed. Rep., 886; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 74; *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq., 168; *Bussing's Executors v. Union Mutual Life Ins. Co.*, 34 O. St., 222; *Coffey v. Universal Life Ins. Co.*, 10 Ins. L. J. [Wis.], 525; *Smith v. National Life Ins. Co.*, 13 Ins. L. J. [Pa.], 330; *Hanthorne v. Brooklyn Life Ins. Co.*, 5 Mo. App., 73; *Michigan Mutual Life Ins. Co. v. Bowes*, 42 Mich., 19; *Wheeler v. Connecticut Mutual Life Ins. Co.*, 82 N. Y., 543; *Dorr v. Phoenix Mutual Life Ins. Co.*, 67 Me., 438; *Universal Life Ins. Co. v. Whitehead*, 58 Miss., 226; *Cooke, Life Ins.*, sec. 84; *Union Central Life Ins. Co. v. McHugh*, 7 Neb., 68.)

*Joseph R. Clarkson*, also for appellee.

POST, J.

This was an action by the plaintiff in the district court of Douglas county to enforce the specific performance of an agreement by the defendant to issue a paid up policy of insurance. There was a finding for the defendant, and a decree dismissing the petition, from which the plaintiff has prosecuted an appeal to this court. There is no controversy with respect to the material facts, which are as follows:

In the year 1884 the defendant company issued a policy of insurance on the life of Andrew W. McLaughlin in favor of his wife, the plaintiff herein. Said policy was for \$5,000 current insurance, upon the payment of an annual premium of \$314.90 on the 26th day of August of each year, to be fully paid up after fifteen of such payments. It was stipulated in said policy that in case of default by the insured after the payment of not less than three of such annual premiums, the defendant company would issue a paid up policy in favor of the plaintiff for as many fifteenth parts of the sum of \$5,000 as equaled the number of premiums so paid, provided said policy should be surrendered duly receipted within six months from the date of

such default. The provisions of the policy with respect to paid up insurance are as follows:

“And further, that if premiums upon this policy, for not less than three complete years, of assurance shall have been duly received by said society, and this policy should thereafter become void in consequence of default in payment of a subsequent premium, said society will issue, in lieu of such policy, a new paid up policy, without participation in profits, in favor of said Elma R. McLaughlin, if living, and if not living to the children of said Andrew W. McLaughlin or their guardian for their use, or if there be no children surviving, then to the executors, administrators, or assigns of said Andrew W. McLaughlin, for as many fifteenth parts of the original amount hereby assured as there shall have been complete annual premiums received in cash by said society upon this policy at the date when such default shall first be made; provided, however, that this policy shall be surrendered duly receipted within six months of the date of default in payment of premium as mentioned above.”

In case of default in payments of premiums by the assured the contract contained the following provision:

“And if any premium or installment of a premium on this policy shall not be paid when due, this policy shall be void; and no credit for surplus accumulated on this policy shall be deemed applicable to the payment of any premium; nevertheless, nothing herein contained shall be construed to deprive the holder of this policy of the privilege to demand and receive paid up insurance in accordance with the agreement contained in this policy.”

It is conceded that three of the annual payments were made by Mr. McLaughlin, to-wit, those for the years 1884, 1885, and 1886, but that he failed to make the payment due in August, 1887. It is further admitted that said policy was not surrendered within six months thereafter, nor was a demand made for paid up insurance until the month

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- of July, 1888, when the insured addressed a communication to the defendant company, in which he inquired what steps were necessary in order to preserve his rights under the contract. In reply to that inquiry he received a communication from the defendant informing him that his policy had been forfeited for the non-payment of the premium, and had then no surrender value. It is shown by the testimony of Mr. McLaughlin that he was, at the dates of both the applications and the policy, cashier of the First National Bank of Plattsmouth, and that Mr. Guyon, the agent who wrote his application, had his headquarters in the same bank. He testifies that he was informed by Guyon, in whom he had great confidence, that after the payment of three premiums his policy would be absolutely non-forfeitable, and that he could not lose the money thus paid. It also appears that he held a second policy for a like amount issued by the defendant company; that, being pressed for money to pay the premiums as they matured, he requested an extension of payments on the last named policy, which request was granted, but after making one or two payments thereon, it was suffered to lapse. This witness, in answer to questions by counsel for the plaintiff and the court, testified as follows:

Q. If I understand you, the payment that lapsed was due in August, 1887?

A. Yes, sir.

Q. You wrote them in July, 1888.

A. Yes.

Q. And they answered saying that your policies had lapsed?

A. Yes, sir.

Q. That they had no surrender value and were forfeited?

A. Yes, sir; that is what they said.

Q. You may state, Mr. McLaughlin, if you have not already, whether you knew of the clause, the proviso, in

the policy respecting the surrender of it within six months after failure to pay. Why did you not know it?

A. Well, I suppose because I hadn't read it is the only particular reason. I took the word of the agent. I know I made a pretty strong effort to raise the third annual premium.

Q. Did you make any effort to raise this money within six months?

A. Yes, sir.

Q. Why didn't you present your policy within six months?

A. The reason why I didn't present it was because I kept thinking all the time I would raise the money and pay it and keep the policy alive; that was the reason. When I found I couldn't do it I wrote to the company.

Q. And the reason you didn't present and surrender the policy within the time provided by the policy was in the hopes that you could raise the money?

A. Yes, sir.

And on cross-examination he testified:

Q. When did you first read the policy?

A. When I wrote the company and got their reply that my policies were lapsed and no good, I then put it in the hands of my attorney. As near as I can remember, I believe it was in August, 1888.

Q. After you had written to the company?

A. Yes.

Q. And the first that you knew of the six months clause was when you read the policy, which reading was brought about through the receipt of this letter that you have spoken of as having received from the company?

A. Yes, sir.

Q. Did you ever offer to surrender the policy to them?

A. I don't know that I made a formal offer to surrender it. I only wrote them asking what was necessary for me to do.

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Q. You couldn't have offered to surrender it at the time because you didn't know of this six months clause?

A. No, sir.

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Q. When you read this policy, as you say you did, a little before you wrote to the company, after you got an answer from the company, you then read the policy?

A. Yes, sir.

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Q. You have had a good deal to do as a business man with different kinds of transactions?

A. Yes, sir.

Q. Especially contracts that you signed?

A. Yes, sir.

Q. Being cashier of a company you were pretty careful about these matters?

A. Yes, sir.

The contract contemplates two conditions precedent to the right of the insured to demand a paid up policy in favor of the beneficiary, viz.: First, the payment of three of the annual premiums; and second, the surrender of the policy, duly receipted, within six months after the default of further payments. Those conditions are not unreasonable, nor do they conflict with any provision of statute or principle of public policy; and courts cannot, without the most flagrant usurpation of legislative powers, refuse to give effect to such engagements where not tainted with fraud, unless the conditions thereof are waived by the act of the party entitled to insist upon their performance. The surrender of the receipted policy within six months after default cannot, on principle, be said to be less essential than the payment of the three yearly premiums. Both are necessary in order to entitle the holder to the paid-up insurance. He might elect, as he apparently did, to take the chances of raising the money to keep this policy alive, trusting to the leniency shown him in the other case; but in doing

so he took the risk of forfeiting his policy in case he continued in default for more than six months. It may be conceded from his statements, and he testifies with evident candor and firmness, that he was unaware of the provision for the surrender of the policy within six months; but that fact does not alter the legal status of the case. The overwhelming weight of authority, if indeed there can be said to exist a diversity of opinion on the subject, is that in the absence of fraud or mistake all previous verbal agreements are merged in the written contract of insurance, which is conclusively presumed to contain the entire engagement of the parties with all the conditions of its fulfillment then contemplated. (*Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S., 252; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y., 389; *Mobile Life Ins. Co. v. Pruett*, 74 Ala., 487; *Mitchell v. Universal Life Ins. Co.*, 54 Ga., 289; *Smith v. National Life Ins. Co.*, 103 Pa. St., 177.)

It is not necessary, however, to invoke the rule above stated in this case, for the reason that the representation of the agent upon which reliance is placed does not relate to the existence of any fact or include even a definite promise for the future. It is at most the statement of an opinion, a mere conclusion that the policy was non-forfeitable, and that the insured could not lose the money invested, in case he made three annual payments. We would feel constrained to hold from the evidence in the record, if that question was essential to the present inquiry, that in the making of the contract in question there was no disparity between the parties. The occupation and experience of the insured certainly rendered him as capable of interpreting and understanding the condition of the policy as Guyon, the agent of the company. It cannot be said that the condition under consideration was not discoverable by the exercise of reasonable care, since it appears in bold type upon

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McLaughlin v. Equitable Life Assurance Society.

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the face of the policy, and is apparent from the most casual examination thereof. The dictates of common prudence would suggest the reading of an agreement involving so much as did this policy to the insured and his family, while it is difficult to conceive how an experienced business man could invest nearly \$1,000 upon a written contract committed to his own custody, relying exclusively upon the statements of the adverse party as to its terms and provisions in a material respect. It is evident that the insured was unacquainted with the conditions of the policy, and that his ignorance was due to his own negligence and in no sense attributable to the fraud or misrepresentation of the defendant company.

We come now to an examination of authorities which have a direct application to the condition relied upon by the defendant. Of the reported cases which have a bearing upon the subject, a decided majority sustain the proposition that where provision is made in the policy for paid up insurance for part of the amount named, upon the surrender thereof within a given time after default, such right must be exercised within the time named. (See *Hudson v. Knickerbocker Life Ins. Co.*, 28 N. J. Eq., 167; *Attorney General v. Continental Life Ins. Co.*, 93 N. Y., 74; *Bussing's Executors v. Union Mutual Life Ins. Co.*, 34 O. St., 222; *Coffey v. Universal Life Ins. Co.*, 10 Ins. L. J. [Wis.], 525; *Smith v. National Life Ins. Co.*, 13 Ins. L. J. [Pa.], 330; *Sheerer v. Manhattan Life Ins. Co.*, 20 Fed. Rep. 886; *Universal Life Ins. Co. v. Devore*, 14 S. E. Rep. [Va.], 532; *Hexter v. United States Life Ins. Co.*, 15 S. W. Rep. [Ky.], 863; *Northwestern Mutual Life Ins. Co. v. Barbour*, 17 S. W. Rep. [Ky.], 796; *Cooke, Life Ins.*, sec. 84 and note on page 152.) We have been referred as authority for the opposing view to *Chase v. Phoenix Mutual Life Ins. Co.*, 67 Me., 85, *Montgomery v. Phoenix Mutual Life Ins. Co.*, 14 Bush [Ky.], 51, and *Southern Mutual Life Ins. Co. v. Montague*, 84 Ky., 653. Of the above cases, *Chase v.*

*Phoenix Mutual Life Ins. Co.* is the only one, as we shall presently see, which can be relied upon to sustain the contention of the plaintiff, and it is severely criticised by the author of *Cooke on Life Insurance*. (See note above cited.) Of the Kentucky cases it may be said that in *Sheerer v. Manhattan Life Ins. Co.*, *supra*, which was a case in the United States circuit court for that district, *Montgomery v. Ins. Co.* is declared to be against the overwhelming weight of authority, and Mr. Justice Mathews, in a concurring opinion, declares the language of the policy too plain for interpretation, and holds that time must be deemed to be the essence of the contract, but in *Hexter v. United States Life Ins. Co.*, and *Northwestern Mutual Life Ins. Co. v. Barbour*, *supra*, the conditions, which were substantially like the one here involved, were held to be essential, and that it was necessary to surrender the policies within the time named in order to render the insurer liable. We are referred in the very able brief submitted by counsel for the plaintiff to the case of *Barnes v. McMurtry*, 29 Neb., 178. It is not claimed for that case that the proposition decided, viz., the validity of a provision limiting the right of action on the policy to six months from the date of the loss has any direct bearing upon the present controversy; but it is argued from the language there used that the plaintiff herein has by his contract acquired an undefined but substantial equity, which may be enforced by decree in this action. The terms "substantial right" and "substantial justice," as used in this connection, are indefinite and illusive, and not susceptible of a precise legal definition. It would seem, however, that one to whom has been awarded the full measure of relief for which he has himself stipulated, is the recipient of substantial justice within the most liberal interpretation of the term, and should not be heard to ask more at the hands of an earthly tribunal. The equities of the case being with the defendant, the decree of the district court is

AFFIRMED.

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**R. E. W. SPARGUR V. JAMES S. ROMINE ET AL.**

FILED JANUARY 4, 1894. No. 6070.

1. **Restraining Collection of Taxes.** A court of equity will not interfere to prevent the collection of taxes on the ground that the assessment and levy thereof are irregular or invalid, unless they are clearly inequitable and the enforcement thereof would be against conscience.
2. **In the construction of pleadings** the facts alleged or admitted, when material, will control rather than the conclusions of the pleader.
3. **Res Adjudicata.** A party asserting an estoppel by means of a former judgment must allege facts which show that his relation to the former action was such as to make the judgment therein conclusive in his favor.

ERROR from the district court of Dawes county. Tried below before BARTOW, J.

The facts are stated in the opinion.

*Allen G. Fisher*, for plaintiff in error.

*Albert W. Crites* and *D. B. Jenokes*, contra:

The petition in this case shows that there was some kind of an assessment, some sort of a levy of taxes, and some kind of a tax list, which, for some reason not stated, was, in point of law, not good as such. This is not sufficient. There must be some facts stated from which the court can see that the assessment is in fact a legal nullity. When a party seeks to enjoin the collection of a tax upon real estate, he must set forth such facts in his petition as will show the collection of the tax unjust and inequitable. (*Southard v. Dorrington*, 10 Neb., 119; *Dillon v. Merriam*, 22 Neb., 151; *Dundy v. Richardson County*, 8 Neb., 508; *South Platte Land Co. v. Buffalo County*, 7 Neb., 253; *South Platte Land Co. v. City of Crete*, 11 Neb., 344.)

There is no offer in the petition to pay the amount of taxes justly and equitably chargeable upon the land. The pleading therefore is defective. (*Wood v. Helmer*, 10 Neb., 65; *Southard v. Dorrington*, 10 Neb., 119; *Hunt v. East-erday*, 10 Neb., 165; *Boeck v. Merriam*, 10 Neb., 199; *Dillon v. Merriam*, 22 Neb., 151; *Wygant v. Dahl*, 26 Neb., 562; *Los Angeles County v. Ballerino*, 32 Pac. Rep. [Cal.], 581; *Welch v. Clatsop County*, 33 Pac. Rep. [Ore.], 934; *German Nat. Bank of Chicago v. Kimball*, 103 U. S., 732.)

Under the form of the allegations of the petition the assessment and subsequent tax proceedings were, at most, merely irregular. Under section 141, chapter 77, revenue law, the tax was not void. (*Wilson v. City of Auburn*, 27 Neb., 435.)

Post, J.

This was an equitable proceeding in the district court of Dawes county, where a demurrer to the petition was sustained and the action dismissed. The sustaining of the demurrer is the only error assigned in this court; hence our inquiry is limited to one proposition, viz., the sufficiency of the petition to entitle the plaintiff therein to equitable relief. From the allegations thereof it appears that the plaintiff is the owner of twenty-two quarter sections of land in said county, which were all taxable for the years 1888, 1889, 1890, 1891, and 1892; that there was a pretended assessment and levy of taxes thereon for the years named, which pretended taxes are void for reasons hereafter stated, but which cast a cloud upon his title, and will, unless canceled and the collections thereof perpetually enjoined, result in tax deeds being executed for his said property. The defendant Reynolds is the county treasurer and the other defendants are holders of tax certificates issued upon the sale of said land for the taxes above described. The only allegations with respect to the assessment and levy of the taxes and sale thereof are contained

in the third and seventh paragraphs of the petition, which are as follows :

“3. That the said defendant Reynolds, by virtue of his office as treasurer aforesaid, is in possession of certain books claimed by defendants to be duplicate tax lists for the years 1888, 1889, 1890, 1891, and 1892, and claiming the right and threatening thereunder to collect taxes against the aforesaid tracts of land, and to certify as pretended liens for taxes against the tracts of land aforesaid certain entries claimed by defendants to have been made in the said pretended tax lists, and to execute thereunder tax deeds for the above described tracts of land to his co-defendants.

“7. Plaintiff alleges that there has never been any description of said tracts of land set forth or contained in any assessment list of the said county; that the assessments upon which the tax lists of the years above mentioned are based are void, and all proceedings based thereon are void; that the pretended descriptions contained in the pretended tax certificates of purchase of the defendants and of the books in the possession of the defendant Reynolds, whereon said pretended certificates are claimed to be founded, are void and are wholly improper, irregular, indefinite, defective, and uncertain, and are not expressed in good language, nor are the characters and abbreviations employed such as are used by conveyances in describing real estate, nor do the people generally use such combinations of words, letters, and figures in referring to and describing land; that the various assessors, clerks, and collectors have wholly and entirely failed and neglected to comply with any of the provisions of the following sections of Cobbey's Consolidated Statutes of Nebraska, viz., sections 3943, 3950, 3961, 3963, 3979, 3981, 3982, 3997, 3999, 4008, 4011, and 4012; that the pretended tax books for the years above mentioned in the possession of the defendant treasurer and his predecessors in office were and are void and without warrant, and conferred no authority upon the defendant

Reynolds or his predecessors in office to collect any taxes, or to make any sale, or to issue any certificates of sale; that none of the above described tracts of land have ever been put in the assessment roll, nor any assessment thereof been made, nor has any of the said above described land had any levy of tax made against it, nor has there been any tax list containing the description thereof, nor has there ever been any advertisement of notice of tax sale thereof, nor has there ever been any return of public sale, nor has there ever been any private sale of the real estate above described."

The sections of the revenue law above enumerated provide, in the order named, for the listing and valuation of real estate for taxation, the preparation of the tax lists, the collection of taxes levied, notice and sale of lands for delinquent taxes and return thereof. The grounds upon which relief is demanded may be thus summarized: The plaintiff is the owner of lands which were taxable for the several years above named; that an attempt was made to assess and tax them in each of said years; that some kind of a tax list was prepared each year, and that said lands have been sold for taxes claimed to have been thus levied; but by reason of some neglect or omission on the part of the various assessors, clerks, and collectors who were charged with the listing and valuation of property and the collection of taxes thereon, said taxes are void, and a deed executed in pursuance of such sale would not divest him of his title. It will be observed that there is no charge that the assessment is unreasonable or fraudulent, that the taxes claimed are for an "illegal or unauthorized purpose," that the amount thereof is more than the plaintiff is in equity bound to contribute to the public revenue for the support of the state, county, and municipal governments, and the public schools of the county, or that he has paid or tendered the amount justly due; nor does he now, as a condition to the relief sought, offer to make contribution of the amount with

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Spargur v. Romine.

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which he is in equity chargeable. Our revenue law, section 144, provides: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose." It is not claimed that the foregoing provision applies to cases in which there has been neither an assessment of the property nor levy of taxes; that is, where there has been no attempt on the part of the officers charged with that duty to levy and collect the funds required for public use by taxation. In such cases it may be assumed that the jurisdiction of courts of equity to grant relief within certain limitations has not been ousted by the statute; but the ground of equitable interference is that there is in such cases no tax which the plaintiff is in equity bound to pay. In the case under consideration the infirmities relied upon are at most irregularities. For instance, the allegation that the tax lists "are wholly improper, irregular, indefinite, and uncertain, and not expressed in good language," also that the characters and abbreviations employed are "not such as are used by conveyances in describing real estate, and that people do not generally use such combination of words, letters, and figures in referring to and describing land," may be, and for the purpose of the demurrer are admitted to be, true. It does not follow, however, that the plaintiff is entitled to relief at the hands of a court of equity. And the statement that the various assessors, clerks, and collectors have failed and neglected to comply with the provisions of the several sections of the Consolidated Statutes enumerated is certainly not consistent with the other allegations of the petition, since it is evident therefrom that there was some kind of an assessment and some kind of a levy of the taxes for each of the years named, and that tax lists of some kind were prepared and delivered to

the treasurer of the county, who has sold the plaintiff's lands for the taxes thus levied. It may also be said of such statement that it is but the conclusion of the pleader, and, according to the well settled rule in the construction of pleadings, will be controlled by the allegations of fact, or admissions therein. (See 1 Boone, Code Pleading, 276.) This case does not differ essentially from the case of *South Platte Land Co. v. City of Crete*, 11 Neb., 344, where it is said: "We conclude, therefore, that the taxes in question were not, as claimed, void, and although perhaps so affected by infirmities as to render them illegal and incapable of enforcement as against the plaintiff's property, there is no visible consideration leading us to say that they are inequitable and should be enjoined." The doctrine of that case has been subsequently approved in *Dillon v. Merriam*, 22 Neb., 151, *Wygant v. Dahl*, 26 Neb., 562, and *Wilson v. Auburn*, 27 Neb., 435; and it may be asserted as a settled rule, even in the absence of a statutory provision on the subject, that courts of equity will not interfere to prevent the collection of taxes on the ground of irregularity or illegality in the proceeding, unless they are also inequitable, and to enforce payment thereof would be against conscience. In some jurisdictions that rule has been extended so far as to deny even a temporary restraining order against the collection of taxes until after payment in full of so much thereof as the court can see ought in equity to be paid, or may be shown by affidavits or otherwise to be due. For instance, in *State Railroad Tax Cases*, 92 U. S., 575, it is said by Justice Miller: "It is not sufficient to say in the bill, that they (complainants) are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted." In the case before us there is no controversy with respect to the amount of taxes equitably chargeable

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against the plaintiff's lands, which are the amounts shown by the several tax lists. The defendants who have purchased the lands for delinquent taxes appear to be satisfied, and, as we have seen, the plaintiff will not be heard to complain.

It is further alleged by the plaintiff that the question of his right to the relief sought has been determined in his favor by the judgment of the district court of Dawes county and is now *res judicata*. Accompanying the petition are the records of two causes which are relied upon to support the plea of former adjudication. In one of the causes mentioned a decree was entered in which the tax lists here involved were declared to be irregular and void and the taxes appearing thereon not to be a lien upon any personal property of the plaintiff therein. That plea is, however, not available to this plaintiff, notwithstanding the decree referred to, for the sufficient reason that he was not a party to the former action, nor was he, so far as this record discloses, in privity with either party thereto. The rule is elementary, that the party asserting an estoppel by means of a former judgment must allege facts which show his relation to the former action was such as to make the judgment therein conclusive in his favor. (See *Hartley v. Gregory*, 9 Neb., 279.) It is clear that the petition fails to state a cause for equitable relief, and that there is no error in the ruling complained of, and that the judgment of the district court should be

**AFFIRMED.**

## HABIG &amp; SPILER V. JOHN LAYNE ET AL.

FILED JANUARY 4, 1894. No. 5583.

1. **Trial: DIRECTING VERDICT.** It is error for a trial court to instruct a jury to return a verdict for the defendants when there is any competent evidence adduced which, if believed by the jury, would support a verdict for the plaintiff.
2. **Question for Jury.** Where the evidence is uncontradicted, and reasonable men might honestly draw different inferences therefrom, it is for the jury, and not the court, to say what inference such evidence warrants.
3. **Partnership.** In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction is not that of a partnership, or does not, at least, entitle the plaintiff to charge the defendants as partners.
4. **Liability of Firm for Contract of Partner.** Where two persons, copartners, took a contract from the state to build for it a building, and one of the partners purchased material used in the construction of such building under a contract in writing, made in his own name with the vendor of such material, there being no understanding with the vendor that the material was furnished to the partner on his individual account, *held*, that the copartnership was liable for the value of the material furnished and used in the construction of said building.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Leese & Stewart*, for plaintiffs in error:

Where any evidence is adduced tending to prove the allegations of the plaintiff's petition, the cause should be submitted to the jury. (*Smith v. Sioux City & P. R. Co.*, 15 Neb., 583.)

The fact that the partnership receives the benefit of a contract tends to prove that it is a partnership contract. (*Stecker v. Smith*, 46 Mich., 14; 1 Lindley, Partnership,

38	743
43	558
38	743
44	120
38	743
47	180
47	818
38	743
49	673
54	267
53	476
38	743
100	565

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177, 189; Abbott, Trial Evidence, 216; Bates, Partnership, sec. 437; *Booe v. Caldwell*, 12 Ind., 12.)

By the terms of the contract between Layne & Krone and the state, the sureties were liable if the material purchased was used in the building. (*Sample v. Hale*, 34 Neb., 220; *Abbott v. Morrisette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *Freeman v. Berkey*, 48 N. W. Rep. [Minn.], 194.)

*Pound & Burr and W. E. Stewart, contra.*

RAGAN, C.

On the 10th day of September, 1887, the state of Nebraska entered into a contract with John Layne and Fred W. Krone, copartners, by which the latter agreed to furnish the material and labor and construct a building for the state on the grounds of the Nebraska institution for the feeble minded youth, near the city of Beatrice. In this contract Layne & Krone promised to pay in full all parties who should furnish any material or perform any labor for them on said building. Layne & Krone, as principals, and George Martin, M. Westover, George Sherrer, A. B. Beach, and J. E. Stockwell, as sureties, gave bond to the state, conditioned that Layne and Krone would faithfully perform all the stipulations of their contract.

The plaintiffs in error, Habig & Spiler, brought this suit against Layne & Krone and the sureties on their bond, alleging the copartnership of Layne & Krone; the contract between them and the state for the erection of said building; their giving bond to pay for materials furnished and used by them in carrying out their contract with the state; that on December 8, 1887, plaintiffs in error entered into a written contract with John Layne, of the firm of Layne & Krone; that said contract was by Layne made for and on behalf of Layne & Krone; that by the terms of such contract plaintiffs in error, for the consideration of \$—,

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Habig v. Layne.

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agreed to furnish the labor and material and construct the galvanized iron cornice, tin roofing, down-spouts, patent shingle roof, ridging tunnels, tower, and porch roofs on the new addition to the building for the feeble minded about to be erected by the state at Beatrice; that they complied with their contract, and that a balance remained due thereon.

The only issue of fact tendered by the answer of the defendants was whether the contract between plaintiffs in error and John Layne was made for and on behalf of Layne & Krone, or on Layne's personal account. The evidence shows that at the date of the contract Habig & Spiler lived in Beatrice and Layne & Krone in Lincoln, and that they were unacquainted; that plaintiffs in error, learning that Layne & Krone had been awarded the contract for the construction of the building for the use of the feeble minded, sent a bid to Layne & Krone at Lincoln for the galvanized iron cornice work, etc., having first figured their bid from the plans and specifications prepared for such building; that some weeks afterwards John Layne was in Beatrice and met Habig, one of the plaintiffs in error, who asked Layne if the bid of Habig & Spiler was low enough, to which Layne replied, "No;" that they, Habig & Spiler, would have to do a little better and offered to accept a bid from them at \$——, which plaintiffs in error then and there accepted. Layne then told Habig to draw up a contract between John Layne and Habig & Spiler and it would be all right. Habig then drew the contract sued on here as the contract of Layne & Krone; that Habig & Spiler performed their contract; that Layne made a payment to them, and that the state made them another payment on the contract; that the labor performed and material furnished by Habig & Spiler went into the construction of the building which Layne & Krone contracted with the state to build. There was no evidence that Layne & Krone had ever dissolved partnership, or that their contract with the state was ever canceled, or that the contract for such

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Habig v. Layne.

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building was ever awarded to any one else than Layne & Krone. After this evidence was given by the plaintiffs in error, they asked the court to instruct the jury as follows:

"1. If you find from the evidence that plaintiffs furnished to Layne & Krone, or either of them, any material to complete the contract of Layne & Krone with the state, and such materials, or any part thereof, have not been paid for, then said Layne & Krone, and the sureties on their bond, are liable for the amount found to be due.

"2. You are instructed that although the contract of the plaintiffs was made in the name of John Layne, yet if it was so made for and in behalf of Layne & Krone in the execution of their contract with the state, then such firm would be bound thereby and all of the defendants herein would be liable for any balance remaining due for material furnished by plaintiffs thereunder."

The court declined to instruct as requested, and instructed the jury to return a verdict for all the defendants except Layne, which the jury did.

The motion of the plaintiffs in error for a new trial was overruled and judgment of dismissal of their case against all the defendants, except Layne, rendered, and Habig & Spiler bring the case here on error.

The court erred in instructing the jury to return a verdict for the defendant, as the evidence adduced was sufficient to support a finding of the jury that Layne made a contract with Habig & Spiler on behalf of Layne & Krone, and for the same reason the court erred in refusing to instruct the jury as requested by the plaintiffs in error. In *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, this court said: "After the introduction of the testimony of the plaintiff to a jury impaneled to try the cause, the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. If the evidence so introduced tends in any degree to sustain the allegations of the plaintiff's petition, the action of the court in summarily

dismissing the action will be deemed prejudicial to the plaintiff, and a new trial will be ordered." In *Stecker v. Smith*, 46 Mich., 14, it is said: "Where several persons put up a building as partners, and one of them buys brick for the purpose, without an express understanding with the vendor that it is an individual purchase, and the brick is actually used in the building, the partners are liable as such for its value. In an action against several defendants impleaded as partners, the plaintiff is entitled to lay all the facts before the jury and have their opinion as to whether the transaction was not that of a partnership, or did not, at least, entitle plaintiff to charge the defendants as partners." To the same effect, see *Booe v. Caldwell*, 12 Ind., 12; Bates, Law of Partnership, sec. 437. But if the labor and material of Haebig & Spiler entered into the construction of this building, and the evidence is sufficient to support a finding of a jury that it did, then Layne & Krone and their sureties are liable for it. This is the letter as well as the spirit of their bond. (*Sample v. Hale*, 34 Neb., 220; *Abbott v. Morrisette*, 48 N. W. Rep. [Minn.], 416; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246; *Lyman v. City of Lincoln*, 38 Neb., 794.)

It appears that this suit was first brought in the county court of Lancaster county, and that plaintiffs in error obtained a judgment there against Layne, and he appealed to the district court. In the latter court plaintiffs in error again obtained judgment against Layne, and on motion and notice to the sureties on the appeal bond of Layne, from the county court, took judgment against such sureties. Counsel for defendants in error say that plaintiffs in error, by reason of having taken judgment against the sureties on the appeal bond from the county court, are now estopped from prosecuting this proceeding in error. We do not think any one can complain of the judgment against Layne or the sureties on his appeal bond except themselves. These defendants in error could not plead such judgments in the

Godfrey v. Megahan.

absence of their satisfaction as a defense to this action. Plaintiffs in error are entitled to judgment against as many of the parties sued as the evidence and the law will give them; and the fact that they have judgment against one or more of the parties sued does not prevent plaintiffs in error from prosecuting this suit against others liable on the same cause of action. *Buchanan v. Dorsey*, 11 Neb., 373, cited by counsel, does not sustain their contention. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ALPHONSO S. GODFREY V. JOHN R. MEGAHAN ET UX.

FILED JANUARY 4, 1894. No. 5630.

1. **Married Women: CONTRACTS.** The disability of a married woman to make a valid contract remains the same as at common law, except in so far as such disability has been removed by our statutes.
2. ———: ———: **SEPARATE ESTATE.** The statute has removed the common law disability of a married woman to make contracts only in cases where the contract made has reference to her separate property, trade, or business, or was made upon the faith and credit thereof, and with intent on her part to thereby bind her separate property.
3. ———: ———: **QUESTION FOR JURY.** Whether a contract of a married woman was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with intent on her part to thereby bind her separate property, is always a question of fact.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Leese & Stewart*, for plaintiff in error:

A married woman can bind her separate property by

38	748
38	700
38	748
42	638
39	748
53	579
53	593
55	556
38	748
59	318

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general engagements. (*Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 246; *Savings Bank v. Scott*, 10 Neb., 87.)

Where a married woman having a separate estate executes a promissory note, the presumption arises that she intends to charge her separate estate with its payment. (*Williams v. Urmston*, 35 O. St., 296; *Hershizer v. Florence*, 39 O. St., 516; *Wicks v. Mitchell*, 9 Kan., 80; *Webb v. Hoselton*, 4 Neb., 314.)

*Webster, Rose & Fisherdick, contra:*

At common law the wife was under the power and authority of her husband. Her legal identity was merged into his. She had of herself no separate legal existence in the eye of the law. Therefore all her contracts were absolutely void. The common law in respect to the rights of husband and wife is in force in this state except so far as it has been changed by statute. (*Aultman v. Obermeyer*, 6 Neb., 264; Comp. Stats. Neb., ch. 53, secs. 2, 4; 2 Kent, Com., 129\*; 1 Bishop, Married Women, sec. 35; *Martin v. Dwelly*, 6 Wend. [N. Y.], 9; *Patterson v. Lawrence*, 90 Ill., 174.)

The rule of the Nebraska cases is that it is for the trial court to determine whether the contract sought to be enforced against a married woman was made with reference to, and upon the faith and credit of, her separate estate. (*Davis v. First Nat. Bank of Cheyenne*, 3 Neb., 246; *Hale v. Christy*, 8 Neb., 264; *Gillespie v. Smith*, 20 Neb., 456.)

RAGAN, C.

Alphonso S. Godfrey sued John R. Megahan and his wife, Maggie E. Megahan, in the district court of Lancaster county on a promissory note in words and figures as follows:

"\$1,004.92. LINCOLN, NEB., December 15, 1890.

"Six months after date, for value received, I promise to pay to the order of A. S. Godfrey one thousand and four

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and .92 dollars, with interest at the rate of ten per cent per annum from maturity until paid. Negotiable and payable at the First National Bank, Lincoln, Nebraska.

“JOHN R. MEGAHAN.

“MAGGIE E. MEGAHAN.”

Mrs. Megahan answered as follows: “Defendant Maggie E. Megahan, for her separate answer to the petition of the plaintiff, says that she is, and at the date of the execution of the note mentioned in said petition, and for a number of years last past, has been, a married woman, the wife of the defendant John R. Megahan, and living with him as his wife; that the defendant signed the note mentioned in the petition at the request of her husband only, and as surety for him, but wholly without consideration, there then being no existing indebtedness or prior obligation on her part to plaintiff or her said husband, and nothing of value having at the time of the signing of the same passed from said plaintiff or her husband to this defendant. Defendant did not, and did not intend thereby to, bind or obligate her separate estate or herself personally for the payment of said note. She received no part of the consideration for which said note was given; no benefits accrued therefrom to her separate estate, property, trade or business, and the said note was not made or given for the benefit of, and did not concern, her separate estate, property, trade or business; and she incurred no personal or other liability by the signing thereof, and was without legal capacity so to do.” Godfrey replied, denying the allegations of this answer, except the coverture of the respondent. The case was tried to the presiding judge alone, who found in favor of Mrs. Megahan and dismissed Godfrey’s suit as to her, and he brings the case here for review. The error assigned is that the judgment is contrary to the evidence and law applicable to the case.

There is some conflict in the evidence, but it supports the following conclusions: That the note in suit was given in

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Godfrey v. Megahan.

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payment of a note of \$500 and an open account owing at the time by Mr. Megahan to Godfrey; that this note and account were for lumber and building material purchased by Mr. Megahan of Godfrey, no part of which was purchased for or on behalf of Mrs. Megahan; that she never had any dealings whatever with Godfrey; that the only property owned by her at the time of suit was the homestead where she resided; that she owned no separate estate or property, and was engaged in no trade or business when she signed the note sued on; that she signed it at her husband's request; that he did not tell her for what purpose he desired her to sign it; that she received nothing for signing it; that she expected her husband to take care of it; that she executed papers when her husband requested her; that she never executed any other note to Godfrey; that she had no conversation with Godfrey about the execution of this note, and that she never purchased any materials or lumber of Godfrey at any time. In other words, that the note in suit was given for a pre-existing debt of Mr. Megahan to Godfrey and that Mrs. Megahan signed the same as surety for her husband, and that her execution of this note was not with reference to, or upon the faith and credit of, her separate property, trade, or business; nor did she intend by signing this note to bind her separate estate for its payment. Under these facts Mrs. Megahan is not liable on this note. At common law the contracts of a married woman were void, and her disability to contract still remains, except in so far as it has been removed by our statutes. (*Aultman v. Obermeyer*, 6 Neb., 260.)

The statute has removed the common law disabilities of a married woman to make contracts only so far as the contracts made have reference to her separate property, trade, or business, or are made upon the faith and credit thereof, and with the intent on her part thereby to bind her separate property. (*Webb v. Hoselton*, 4 Neb., 308; *Davis v. First Nat. Bank of Cheyenne*, 5 Neb., 242; *Hale v. Christy*,

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 Arnold v. State.
 

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8 Neb., 264; *Barnum v. Young*, 10 Neb., 309; *State Savings Bank, St. Joseph, Mo., v. Scott*, 10 Neb., 83.) This is the construction given to our statutes for the last fifteen years. It has become a rule affecting the rights and liabilities of individuals, and if unsatisfactory, appeal should be made to the legislature for its modification, and not to the courts. Whether a contract of a married woman sued on was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with the intention on her part to thereby bind her separate property, is always a question of fact. The judgment of the district court is

AFFIRMED.

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### GEORGE S. ARNOLD V. STATE OF NEBRASKA.

FILED JANUARY 4, 1894. No. 4433.

1. **Criminal Law: PLEA IN BAR: FORMER JEOPARDY: DEMUR-  
RER: JURY TRIAL.** The prosecuting attorney may interpose a demurrer to a plea in bar offered under section 449 of the Criminal Code by a prisoner indicted for a felony, and have the judgment of the court, whether the facts stated in such plea are sufficient, if true, to prevent the trial of the prisoner for the crime for which he stands indicted and arraigned; but where the plea in bar is good, then the issues raised by it, and the state's reply thereto, must, and can only, be tried by a jury.
2. **Power to Waive Jury Trial of Issues Raised by a  
Plea in Bar.** In such a case it is beyond the power of the state's attorney and prisoner, by agreement, to substitute another tribunal than the one prescribed by statute for the trial of such issues. The law is designed for the protection of the state as well as the prisoner, and its mandates cannot be evaded by contract, nor can a prisoner charged with a felony waive the right to a jury trial of such issues.
3. ———. The language, "in the absence of a valid agreement to proceed otherwise," found in the second paragraph of the syllabus in *State v. Priebnow*, 16 Neb., 131, disapproved.

38	762
42	361
38	762
51	344
51	587
55	196

ERROR to the district court for Scott's Bluff county. Tried below before CHURCH, J.

*George W. Heist and Henry St. Rayner*, for plaintiff in error :

When a plea in bar is interposed to a prosecution upon indictment, and it states facts which, if true, would constitute a bar to further prosecution, the truth of the plea must be ascertained by a jury. (*State v. Priebnow*, 16 Neb., 131.)

*George H. Hastings, Attorney General*, for the state.

RAGAN, C.

George S. Arnold was tried in the district court of Scott's Bluff county for the crime of murder, found guilty, and sentenced to imprisonment in the penitentiary. From this judgment he prosecutes error to this court.

Arnold, at the time of his arraignment, August 26, 1889, offered to the indictment against him a plea in bar as follows: "Now comes George S. Arnold, defendant, in his own proper person, into court here, and having heard the indictment read in the above entitled cause, says that the state of Nebraska ought not further to prosecute said indictment against him, because at the December, 1888, term of the district court of Cheyenne county, Nebraska, held at Sidney, in said county, he, the said George S. Arnold, was indicted by the grand jury of said county on said charge; that he was duly arraigned in said court on said indictment and pleaded 'not guilty' thereto; that after having pleaded 'not guilty,' and being placed upon his trial, was lawfully acquitted by being discharged of the offense charged in said indictment." To this plea the prosecuting attorney filed the following reply: "Now comes W. J. Richardson, prosecuting attorney of Scott's Bluff county, state of Nebraska, and replying to the plea in bar of said

defendant, says that he denies each and every fact stated therein." The record before us sets out: "On the 29th day of August, 1889, the said plea in bar was tried to said court; and after hearing the evidence and arguments of counsel, the court did overrule the same, to which defendant excepted." It appears that the court, and not a jury, tried the issues of fact made by the plea in bar and reply thereto, and this is assigned as error.

Section 449 of the Criminal Code provides: "The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense; and to this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon; and on the trial of such issue to a jury," etc. The record does not disclose that Arnold demanded a jury to try the truth of the facts alleged in his plea in bar, nor does it disclose that he waived his right to a jury to try the issues joined by such facts. But he did not need to demand a jury for that purpose, as the law required the matter in issue to be tried, not by a judge, but by a jury; and, if the prisoner had waived the jury, and the record so showed, he would not be estopped from alleging the failure to try this matter to a jury as error. The statute was designed for the protection of the state as well as the prisoner. His consent could not change the law. The rights given him by statute he could not waive; and, even by agreement with the state's prosecutor, the tribunal which the law provided for the trial of this issue could not be set aside and some other tribunal substituted. (*State v. Lockwood*, 43 Wis., 403; *State v. Davis*, 66 Mo., 684; *Williams v. State*, 12 O. St., 622; *State v. Mansfield*, 41 Mo., 470; *Allen v. State*, 54 Ind., 461; *Ward v. People*, 30 Mich., 116.) We have no doubt the prosecuting attorney may interpose a demurrer to a plea in bar offered by a prisoner indicted for a felony and have the rul-

ing of the court whether the facts stated in the plea, if true, are sufficient to prevent a trial of the prisoner under the indictment under which he has been arraigned. (*State v. Priebnow*, 16 Neb., 131.) But where the allegations of the plea in bar, liberally and fairly construed, substantially state that the prisoner has before, by a court having jurisdiction, had judgment of acquittal, or in such court been convicted, or has been pardoned for the same offense for which he stands charged in the indictment to which the plea in bar is offered, then the truth of the facts averred in said plea must, and can only, be tried by a jury. This is laid down in *State v. Priebnow, supra*, in the second paragraph of the syllabus, in these words: "When a plea in bar is interposed to the prosecution upon indictment which is clearly insufficient, a demurrer may be filed thereto without resorting to the formality of impaneling a jury to try the issue presented by the plea; but if the plea states facts which, if true, would constitute a bar to further prosecution, the truth of the plea must, in the absence of a valid agreement to proceed otherwise, be ascertained by a jury." But the words, "in the absence of a valid agreement to proceed otherwise," import that a prisoner indicted for felony can, by agreement, waive his right to a jury trial of the issues made by the averments of his plea in bar, and the state's reply thereto. We do not think he can, and the language quoted above must be overruled. The error assigned is sustained, the judgment of the district court reversed, and the cause remanded with instructions to set aside the verdict and judgment and grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

## LIZZIE C. SKINNER V. GEORGE B. SKINNER.

FILED JANUARY 4, 1894. No. 5608.

38	756
42	640
38	756
44	886
38	756
45	247
38	756
46	206

1. To sustain an action for use and occupation of real estate the relation of landlord and tenant must exist between the parties by agreement, either expressed or implied.
2. One in exclusive possession of the real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission.
3. Landlord and Tenant. The law, in the absence of all evidence to the contrary, will imply the existence of the relation of landlord and tenant between two parties, where one owns land, and with his knowledge and permission, such land is used and occupied by another.
4. If the tenant's use and occupation has been beneficial to him, that is sufficient from which to imply a promise on his part to pay a reasonable compensation for such use and occupation, in the absence of any evidence negating such promise.
5. Witnesses: HUSBAND AND WIFE. In a suit by a married woman against her husband for the use and occupation by him of her real estate the wife is not a competent witness.
6. Pleading Under Code. It is not material by what name, or whether by any, an action under the Code is designated. The pleader should state the facts, and if they constitute a cause of action, the law affords the remedy without reference to the form of the action.

ERROR from the district court of Lancaster county.  
Tried below before TIBBETS, J.

The opinion contains a statement of the case.

*Charles O. Whedon*, for plaintiff in error:

The married woman's act of 1871 wholly removed the common law disability of a married woman and repealed section 331 of the Code so far as it prevents a married

woman from testifying in a suit brought by her against her husband. (*May v. May*, 9 Neb., 16; *Pope v. Hooper*, 6 Neb., 187; *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 486.)

*G. M. Lambertson and Abbott, Selleck & Lane, contra:*

The petition does not state a cause of action. Such a suit cannot be maintained by a wife against her husband. (*Barber v. Root*, 10 Mass., 260; *Aultman v. Obermeyer*, 6 Neb., 264; *Fowler v. Trebein*, 16 O. St., 498; *White v. Wager*, 25 N. Y., 328; *Winans v. Peebles*, 32 N. Y., 423; *Lord v. Parker*, 3 Allen [Mass.], 127; *Smith v. Gorman*, 41 Me., 405; *McKeen v. Frost*, 46 Me., 239; *Dwelly v. Dwelly*, 46 Me., 377; *Farrell v. Patterson*, 43 Ill., 52; *Reeves v. Webster*, 71 Ill., 307; *Aiken v. Davis*, 17 Cal., 119.)

In order to maintain an action for use and occupation the relation of landlord and tenant must exist. Occupancy under some contract, express or implied, must be shown. (*Thompson v. Bower*, 60 Barb. [N. Y.], 463; *Smith v. Stewart*, 6 Johns. [N. Y.], 46; *Sylvester v. Ralston*, 31 Barb. [N. Y.], 287; *Marquette, H. & O. R. Co. v. Harlow*, 37 Mich., 555; *Dalton v. Laudahn*, 30 Mich., 349; *Hogsett v. Ellis*, 17 Mich., 351; *Long v. Bonner*, 11 Ired. [N. Car.], 27; 2 Wood, Landlord & Tenant, sec. 546; *Moore v. Harvey*, 50 Vt., 297; *Brewer v. Craig*, 18 N. J. Law, 214; *Stewart v. Fitch*, 31 N. J. Law, 17; *Mitchell v. Pendleton*, 21 O. St., 664; *Nance v. Alexander*, 47 Ind., 516; *Espy v. Fenton*, 5 Ore., 423.)

The wife cannot testify in this case against her husband. (Sec. 331, Code; *Lord v. State*, 17 Neb., 526; *Karney v. Paisley*, 13 Ia., 89; *Russ v. Steamboat War Eagle*, 14 Ia., 363; *Blake v. Graves*, 18 Ia., 312; *Stephenson v. Cook*, 64 Ia., 265; *Bartlett v. Bartlett*, 15 Neb., 595; *Shoeffler v. State*, 3 Wis., 717; *Farrell v. Ledwell*, 21 Wis., 184.)

RAGAN, C.

Lizzie C. Skinner sued George B. Skinner in the district court of Lancaster county, alleging, as her cause of action, that she was the owner of certain real estate; that George B. Skinner, by her permission and as her tenant, had occupied and used said real estate for about four years, and though often requested, had never paid anything whatever for his use and occupancy thereof; that the reasonable rental value of said property during the time said George B. Skinner had occupied it was \$1,200 per year. George B. Skinner's answer, so far as it is material here, admitted his use and occupation of the property; averred that the property was his, Mrs. Skinner holding the legal title as his trustee; that he and Mrs. Skinner were husband and wife; that the relation of lessor and lessee had never existed between him and Mrs. Skinner; that she had never made demand on him for rent; that he had never paid any rent; and he further denied that he used and occupied said premises by her permission or as her tenant, but averred that he occupied them with her knowledge. Mrs. Skinner's reply admitted that she and Mr. Skinner were husband and wife, and denied the other allegations of the answer recited above. Mrs. Skinner proved her title to the property and the rental value, and then offered herself as a witness to prove that Mr. Skinner occupied said real estate as her tenant; that she had paid \$800 taxes on said real estate during said time; that Mr. Skinner took possession of and erected some buildings on said property by her permission; and that she had paid \$400 insurance on said buildings. Counsel for Mr. Skinner objected to Mrs. Skinner's testifying, on the ground that she being the wife of the defendant could not testify against him. The court sustained the objection. Mrs. Skinner excepted. No evidence was offered by George B. Skinner. The court dismissed Mrs. Skinner's case, and she brings the cause here for review.

The first error alleged is the refusal of the court to permit Mrs. Skinner to testify against her husband. By section 331, title 10, Code of Civil Procedure, it is provided: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other; but they may in all criminal prosecutions be witnesses for each other." If this statute is still the law, it is decisive of the question presented. This statute was passed in 1855, and counsel for Mrs. Skinner argues that it is no longer in force. He bases this conclusion on chapter 53, Compiled Statutes, 1893, entitled "Married Women," sections 2, 3, and 4 of which act provide:

"Sec. 2. A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"Sec. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"Sec. 4. Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole separate property, and may be used and invested by her in her own name."

Counsel says: "By this act the legislature removed the common law disabilities of a married woman." But this act has no reference to the right of married women to testify. It does not define, nor attempt to define, what shall be evidence, nor who shall be competent witnesses in any case. It does not deal with the subject of either witnesses or evidence. At common law the contracts of a married woman were void, and the object, and the only object, of this statute (chapter 53) was to remove her disa-

bility to contract, and permit her to contract with reference to her separate property, trade, or business. (*Godfrey v. Megahan*, 38 Neb., 748, and cases there cited; *Niland v. Kalish*, 37 Neb., 47.) In *Lawson v. Gibson*, 18 Neb., 137, the rule as to the repeal of statutes by implication is thus stated: "A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable."

Now there is no repugnancy whatever between section 331 of the Code of Civil Procedure, defining the cases and circumstances in which a husband or wife becomes a competent witness against the other, and the so-called "married woman's act," removing the common law disabilities of a married woman to make contracts and sue and be sued. At common law neither husband nor wife could testify one against the other in any case. The rule still remains, except in so far as it has been changed by our statutes. The changes made by the statutes now in force permit a husband or wife to testify one against the other only in proceedings for divorce, and in criminal proceedings for a crime committed by the one against the other. If the statutes, as they exist, are unjust and oppressive, appeal should be made to the legislature to modify them. The court is but a humble interpreter, whose duty it is to give effect to the mandates of the sovereign people as found in the laws enacted by the legislative department of the state. The court did not err in refusing to permit Mrs. Skinner to testify.

The pleadings and evidence in the case establish that Mrs. Skinner owned the real estate described in the petition; that George B. Skinner had used and occupied it for four years, and that its reasonable and fair rental value for that time was \$——; that plaintiff and defendant were husband and wife, and that the property used and occupied by the defendant was not the homestead of the parties. It was not proved that George B. Skinner occupied said premises under an express agreement to pay rent; nor that he

went into possession by Mrs. Skinner's express permission; nor that his taking possession of said property was wrongful; nor was it proved that he had ever paid any rent or been requested to pay any. Section 1, chapter 53, Compiled Statutes, 1893, provides: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband." The design of this statute was to protect the wife's separate property from the control and disposition of her husband; to make them, so far as her separate estate is concerned, strangers. To give effect to this policy requires that in such cases as the one at bar the same presumptions should be indulged as in an action between strangers; any other course would permit the husband to gain the usufruct of his wife's property, and undo the policy of the law. A married woman would thus be restored to her common law status. With the question as to whether this is a wise law we have nothing to do. It is the law, and that is sufficient for us. The evidence further showed that Mrs. Skinner acquired this real estate by purchase after her marriage to Mr. Skinner; that the title has remained of record in her name since 1878, and this raises the presumption that it is her separate property.

Counsel for appellee George B. Skinner say: "The statute which says 'a woman may, while married, sue and be sued, in the same manner as if she were unmarried,' does not authorize a married woman to sue her husband at all, because if she were unmarried she could not sue her husband, since she would have none to sue." The answer to this proposition is, "that if this woman was unmarried,

she could at common law sue this man; being a married woman, she could not at common law sue her husband, or any one else; but the statute having removed her common law disability in that respect, she may now sue any person whom she could sue, either at common law or under the statute, if she were unmarried. Her legal ability to sue and be sued is not limited to matters having reference to her separate property, trade, or business, as is her legal ability to make contracts."

The rights, then, of the parties to this suit are to be determined as though the parties were strangers, and the question is, does the law imply a promise on the part of George B. Skinner to pay his wife what the use and occupation of her real estate by him was reasonably worth during his occupancy and use thereof? The form of action in this case seems to be given much prominence by counsel for appellee in his brief and in the authorities cited by him. It is true that the action is designated as one for use and occupation. It is not material by what name, or whether by any, an action under the Code is designated. The pleader should state the facts, and if they constitute a cause of action the law affords the remedy.

We have examined all the authorities cited by counsel for the appellee George B. Skinner to the point that an action for use and occupation for land will not lie in this case, and of those cited we notice the following:

In *Nance v. Alexander*, 49 Ind., 516, Alexander owned a house standing on a lot for which he held a lease. This house was levied on and sold under an execution and purchased by Nance, who went into possession and occupied the same for some time. The sale under the execution having been set aside, Alexander sued Nance for use and occupation, and the court said: "The finding and judgment cannot be sustained on the evidence. A suit for use and occupation can only be sustained where the relation of landlord and tenant exists expressly or by implication."

In *Mitchell v. Pendleton*, 21 O. St., 664, the facts were: Pendleton owned a lot in the city of Cincinnati extending from Vine to Walnut street. Mitchell & Co. had a lease of a part of this lot and used it for a lumber yard, and had verbal permission to use the other part without paying rent therefor. In November, 1865, Pendleton notified Mitchell that if he continued to use the unleased portion of the lot after a certain date, he would be expected to pay rent. Thereupon Mitchell notified Pendleton that he did not wish to use the unleased portion of the lot any longer, and offered to remove the fence which he had put across it; but Pendleton requested him to let the fence remain, as the lot, if unfenced, might become a nuisance. Shortly after this Mitchell moved all his lumber from that part of the lot not embraced in the lease. Such part of the lot, however, remained unoccupied and vacant, and Mitchell drove his teams across it and threw lumber off his wagons on it, and let the lumber lie there, but made no piles of boards on the land. After the expiration of the lease for that part of the lot occupied for a lumber yard by Mitchell, Pendleton sued Mitchell for the use made by him as above stated, of the portion of the lot not covered by his lease, and the court said: "There was no express contract to pay rent for the land not embraced in the lease; and we think none can be implied from the facts of the case, but rather that such implication is negatived by the conduct of both parties."

In *Stewart v. Fitch*, 31 N. J. Law, 17, the facts were thus stated by the judge delivering the opinion of the court: "The plaintiff is the owner of land in the county of Burlington, bounding on the Delaware river. The defendants, who are lumber merchants, were in the habit of occupying the mud flats adjacent to and in front of plaintiff's lands with their rafts and floats of lumber, and the action in this case was brought for such use and occupation of the flats;" and the court decided: "The action for use and occupation

can only be maintained upon a contract, express or implied. A shore owner cannot maintain an action against a party using lands in front of him between high and low water mark unless he has reclaimed or improved the land so used."

In *Brewer v. Administrators*, 18 N. J. Law, 214, the decision was: "No action can be maintained for use and occupation where the relation of landlord and tenant does not exist; and that relation does not exist where the defendant enters upon land under a contract of purchase and sale or for a deed. If, under such contract, the purchaser enter upon land and cut and sell the timber thereon, the law will not raise an implied contract on which he is liable for goods and timber sold and delivered."

In *Smith v. Stewart*, 6 Johns. [N. Y.], 46\*, I quote the opinion of the court in full: "At common law no action of assumpsit for rent would lie except upon an express promise made at the time of the demise. The present action is given by the statute of 11 George 2d, chapter 19, section 14, which we have adopted. But this statute, from the terms of it, seems to apply only to the case of a demise and where there exists the relation of landlord and tenant founded on some agreement creating that relation. \* \* Here the defendant did not enter under such a relation, but under a contract for a deed. He therefore entered under a color of title which might have been enforced in equity. He finally refused to perform the contract and changed himself into a trespasser, and the better opinion is, notwithstanding the case of *Hearn v. Tomlin*, Peake's N. P., 192, that he never was strictly a tenant and never entitled to notice to quit, nor liable to distress or to an action of assumpsit for rent. He is liable in another way to be turned out as a trespasser, and is responsible in that character for the mesne profits."

In section 19, Taylor's Landlord and Tenant, it is said: "The relation of landlord and tenant may be created by

implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand and an occupation by permission on the other, for in such cases it will be presumed that the occupant intended to pay for the use of the premises. It will be implied in many cases where there has been no distinct agreement between the parties, or where, from various causes, the agreement may have ceased to be operative." In section 655 the same author says: "Almost any evidence which shows the relation of landlord and tenant to exist between the parties, will support this action (use and occupation). It is not necessary for the plaintiff to prove an express contract with the tenant when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied in all cases where a permissive holding is established."

In *Dwight v. Cutler*, 3 Mich., 566, it was held: "Where the occupancy of premises by a tenant at will has been beneficial to him, that is a sufficient ground to imply a promise to pay a reasonable sum as compensation for such occupancy, unless there is something in the circumstances inconsistent with the notion of such a promise or of an obligation to pay."

In *Hogsett v. Ellis*, 17 Mich., 351, Christiancy, J., speaking for the court, said: "It is very clear that assumpsit for use and occupation cannot be maintained where the relation of landlord and tenant did not exist during the occupancy, or when the holding has been adverse to the owner, because, among other reasons, a disputed title cannot be tried in an action of assumpsit; but when the relation exists and the occupancy has been beneficial to the defendant, we think, upon principle and the weight of American authority, the law implies a promise to pay a reasonable compensation, unless there be an express contract or other circumstance inconsistent with the notion of such

promise, or with the duty or obligation to pay. \* \* \* And we think the mere fact of the occupancy by A of the land of B is *prima facie* evidence that A is the tenant of B, which can only be rebutted by showing some fact or circumstance tending to rebut this inference. \* \* \* But this inference would not tend to establish one kind of tenancy more than another, but simply the relation of landlord and tenant. \* \* \* But it has been said that at common law a tenant at sufferance was not liable for rent; and this must be so beyond question, as to 'rent,' strictly so called, which always grows out of express contract and is fixed and definite in amount.

"The contract being terminated before the tenancy commences, there is nothing from which rent as such can arise; but the reason generally given for the rule is broad enough to cover the reasonable compensation for use and occupation, or, rather, it applies to this as well as to rent."

In *Dalton v. Laudahn*, 30 Mich., 349, the real point decided in the case was that one could not sue a railroad company for rent when he had never consented that the railroad company might use his land and had warned it that it had no right in the soil and that it went upon the land at its peril, the court saying that the action for use and occupation of lands was based on the contract relation of landlord and tenant and rested upon an express or implied agreement to pay rent during the tenancy.

From the foregoing authorities we deduce the following principles:

1. To sustain an action for use and occupation of real estate the relation of landlord and tenant must exist between the parties, based on an agreement, expressed or implied.

2. One in the exclusive possession of real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission.

3. That the law, in the absence of all evidence to the

Welton v. Dickson.

contrary, will imply the existence of the relation of landlord and tenant between two parties where one owns land, and by his permission it is used and occupied by the other.

4. That if the tenant's use and occupation has been beneficial to him, that is sufficient ground from which to imply a promise on his part to pay a reasonable compensation for such use and occupation, in the absence of any evidence negating such promise.

We are therefore of the opinion that Mrs. Skinner is entitled to recover in this action, from her husband, a fair and reasonable compensation for his use and occupation of her real estate, and that the decree of the court dismissing her petition was error. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

ALBERT WELTON, APPELLEE, V. THOMAS J. DICKSON  
ET AL., APPELLANTS.

FILED JANUARY 4, 1894. No. 5488.

38	767
44	591
38	767
45	894
38	767
49	668
51	739
53	58
38	767
58	825

- Eminent Domain: PRIVATE PROPERTY FOR PRIVATE USE.**  
The constitutional provision, "The property of no person shall be taken or damaged for public use without just compensation," prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner.
- Such constitutional provision forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.**
- The want of power in a legislature to transfer to one man the property of another without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature.**

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Welton v. Dickson.

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4. **Eminent Domain.** When the public exigencies demand, the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.
5. **But what is such a public use as will justify the exercise of the power of eminent domain is a question for the courts to decide.** But if the public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears from the provisions of the act that they can have no tendency to advance and promote such public use. *Bankhead v. Brown*, 25 Ia., 540, and *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, followed.
6. **Private Roads: CONSTITUTIONAL LAW.** Sections 47, 48, 49, 50, 51, and 52 of chapter 78, Compiled Statutes, 1893, authorize the taking of private property for private use, the roads therein mentioned being essentially private and beyond the public control, and said sections are therefore unconstitutional and void.
7. **Equitable Jurisdiction: INJUNCTION.** The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction; and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Watson v. Sutherland*, 72 U. S., 74, followed.

APPEAL from the district court of Lancaster county.  
Heard below before HALL, J.

The opinion contains a statement of the case.

*N. Z. Snell* and *Beeson & Root*, for appellants:

The county commissioners have exclusive original jurisdiction in laying out and establishing roads. In this class of cases the board acts judicially. It is discretionary with it to grant or refuse the relief asked. The only way its final orders in such cases can be attacked is by review. (*State v. Clary*, 25 Neb., 403; *State v. Palmer*, 18 Neb., 644.)

There being an adequate remedy at law, chancery will not

interfere. (*Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Neb., 193; *Ellis v. Karl*, 7 Neb., 381.)

The proper place to raise questions as to the propriety or impropriety of establishing the proposed road is before the commissioners themselves. The remedy of the party aggrieved by the decision is by a direct proceeding to review in the district court. (*Poyer v. Village of Des Plaines*, 123 Ill., 111; *Wallack v. Society*, 67 N. Y., 23; 1 High, Injunctions [2d ed.], secs. 29, 88; 2 High, Injunctions [2d ed.], secs. 1242, 1244, 1257, 1258; *West v. Mayor of New York*, 10 Paige [N. Y.], 539.)

The sections of chapter 78, Compiled Statutes, providing for the establishment of roads, are not unconstitutional as allowing private property to be taken for private use. The law is valid. (*Sherman v. Buick*, 32 Cal., 241; *Allen v. Stevens*, 5 Dutch. [N. J.], 509; *In re Hickman*, 4 Harring. [Del.], 580; *Harvey v. Thomas*, 10 Watts [Pa.], 65; *Pocopson Road*, 16 Pa. St., 15; *Killbuck Private Road*, 77 Pa. St., 39; *Waddell's Appeal*, 84 Pa. St., 90; *Metcalf v. Bingham*, 3 N. H., 461; *Proctor v. Andover*, 42 N. H., 351; *Brewer v. Bowman*, 9 Ga., 37; *Robinson v. Swope*, 12 Bush [Ky.], 21; *McCauley v. Dunlap*, 4 B. Mon. [Ky.], 57; *Denham v. County Commissioners of Bristol*, 108 Mass., 202; *Jones v. Andover*, 6 Pick. [Mass.], 59; *Commonwealth v. Hubbard*, 24 Pick. [Mass.], 98; *Ferris v. Bramble*, 5 O. St., 109; *Shaver v. Starrett*, 4 O. St., 494; *Bankhead v. Brown*, 25 Ia., 540.)

*Pound & Burr, contra:*

Commissioners acting under color of law and proceeding without any legal authority to permanently appropriate the land of a private citizen may be enjoined from proceeding with such appropriation. (2 High, Injunctions, secs. 1308, 1309, 1318; *Beatty v. Beethe*, 23 Neb., 210; *Follmer v. Nuckolls County*, 6 Neb., 204; *McArthur v. Kelly*, 5 O., 140; *Anderson v. Hamilton County*, 12 O. St., 635; *Mo-*

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*hawk H. R. Co. v. Artcher*, 6 Paige [N. Y.], 83; *Wild v. Deig*, 43 Ind., 455; *Witham v. Osburn*, 4 Ore., 318; *Green v. Green*, 34 Ill., 320; *Green v. Oakes*, 17 Ill., 249; *Lumsden v. City of Milwaukee*, 8 Wis., 239; *Waddell's Appeal*, 84 Pa. St., 90; *Coster v. Tide Water Co.*, 18 N. J. Eq., 55.)

It is well established that when county commissioners or other public officers are proceeding in excess of their powers, or in the absence of power or jurisdiction, and their acts are likely to result in irreparable injury to property owners, an injunction is the appropriate relief. (*Armstrong v. City of St. Louis*, 3 Mo. App., 151; *Town of Covington v. Nelson*, 35 Ind., 532; *Conrad v. Smith*, 32 Mich., 429; *Carter v. City of Chicago*, 57 Ill., 283; *Dinwiddie v. President and Trustees of Rushville*, 37 Ind., 66; *Mayor and City Council of Baltimore v. Gill*, 31 Md., 375; *Lumsden v. City of Milwaukee*, 8 Wis., 239; *Follmer v. Nuckolls County*, 6 Neb., 204; *Vanderlip v. City of Grand Rapids*, 41 N. W. Rep. [Mich.], 677; *Board of Commissioners of Benton County v. Templeton*, 51 Ind., 266.)

When there is some legal remedy, but it is clearly inadequate to give the relief to which the plaintiff is entitled, he may have an injunction. (*Watson v. Sutherland*, 5 Wall. [U. S.], 74; *Bishop v. Moorman*, 98 Ind., 1; *Keene v. Bristol*, 26 Pa. St., 46; 3 Pomeroy, Equity, sec. 1399; *Roy v. Atchison & N. R. Co.*, 4 Neb., 439; *Omaha & N. W. R. Co. v. Menk*, 4 Neb., 21.)

A constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation" should be construed as equivalent to a declaration that private property, without the consent of the owner, shall be taken only for public use, and this only upon a just compensation. Such a provision prohibits private property from being taken for private use. (Sedgwick, Stats. & Const. Law [2d ed.], pp. 447-450; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. [N. Y.], 9; *Reeves v.*

*Treasurer of Wood County*, 8 O. St., 346; *McQuillen v. Hatton*, 42 O. St., 204; *Jenal v. Green Island Draining Co.*, 12 Neb., 166; *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb., 468; *Osborn v. Hart*, 24 Wis., 90; *In re Application of Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y., 49; *Anderson v. Kerns Draining Co.*, 14 Ind., 199; *Tyler v. Beacher*, 44 Vt., 648; *Consolidated Channel Co. v. Central P. R. Co.*, 51 Cal., 269; *Beekman v. Saratoga S. R. Co.*, 3 Paige Ch. [N. Y.], 73.)

Statutes authorizing private roads or right of way to be laid out across the lands of unwilling persons by the exercise of the right of eminent domain are held, in states having a constitutional provision like our own, unconstitutional and void. (*Bankhead v. Brown*, 25 Ia., 540; *Nesbitt v. Trumbo*, 39 Ill., 110; *Wild v. Deig*, 43 Ind., 455; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Dickey v. Tennison*, 27 Mo., 373; *Osborn v. Hart*, 24 Wis., 89; *Clack v. White*, 2 Swan [Tenn.], 540; *Varner v. Martin*, 21 W. Va., 534; *Roberts v. Williams*, 15 Ark., 43; *Witham v. Osburn*, 4 Ore., 318; *Sadler v. Langham*, 34 Ala., 311; *Crear v. Crossly*, 40 Ill., 175; *Stewart v. Hartman*, 46 Ind., 331; *Sholl v. German Coal Co.*, 118 Ill., 427; *Ross v. Davis*, 97 Ind., 79; *Elliott, Roads & Streets*, p. 146; *Lewis, Eminent Domain*, sec. 167.)

As to what is a public use is a question of law to be decided by the courts. (*McQuillen v. Hatton*, 42 O. St., 202; *Tyler v. Beacher*, 44 Vt., 648; *In re Application of Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y., 42; *City of Savannah v. Hancock*, 91 Mo., 54; *Coster v. Tide Water Co.*, 18 N. J. Eq., 55.)

RAGAN, C.

Chapter 78, Compiled Statutes of 1893, provides:

"Sec. 47. When the lands of any person shall be surrounded or enclosed, or be shut out and cut off from a

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public highway by the lands of any other person or persons, who refuse to allow such person a private road to pass to or from his or her said land, it shall be the duty of the county board, on petition of any person whose land is so surrounded or shut out, to appoint three disinterested freeholders of the precinct or township, in counties under township organization, in which the land lies, as commissioners to view and mark out a road from land of the petitioner to the nearest public highway, and assess the damages the person will sustain through whose land the road will pass.

“Sec. 48. The person desiring to secure the right of way shall give the person or persons through whose lands the road will run at least two days’ notice of such intended application, by leaving or causing to be left a written notice at his usual place of abode; and satisfactory evidence that such notice has been given shall be presented to the board before commissioners shall be appointed.

“Sec. 49. The commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath before some judge or justice of the peace, that they are not interested nor of kin to either of the parties interested in the proposed road, and that they will faithfully and impartially view and mark out said road to the greatest ease and convenience of the parties, and as little as may be to the injury of either, and assess the damages which will be sustained by the party through whose land it will run.

“Sec. 50. Said commissioners shall make out a report of their proceedings, stating particularly the course and distance of said road, and the amount of damages assessed, which report, together with a certificate of the oath, shall be returned to the county commissioners and filed by the county clerk.

“Sec. 51. If the report be approved by the county board, and the petitioner shall produce satisfactory evidence that he has paid the damages assessed (or tendered payment, if

the party refuse to receive it), and all costs attending the proceedings, the county board shall grant an order to said petitioner to open a road not exceeding fifteen feet in width; and if any person or persons obstruct said road, such person or persons shall be liable to all the penalties for obstructing a public road; *Provided, however,* If such road shall pass through any inclosure, and it shall be required by the owner thereof, the person applying for such road shall put up and keep at each entrance into such inclosure a good and substantial swinging gate; *Provided further,* That either party may appeal from the decision of the county board in like manner as prescribed in case of public roads.

“Sec. 52. Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever.”

The board of county commissioners of Lancaster county, on the petition of Owen Marshall and Aaron C. Loder, appointed three commissioners, who viewed and marked out a private road through the land of one Albert Welton, and made report of their proceedings to said board of county commissioners. Thereupon, Welton brought this suit in the district court of Lancaster county to enjoin Marshall and Loder, and the board of county commissioners, from laying out and establishing on his land the private road petitioned for. The suit is based on the grounds that the statute quoted above is unconstitutional, and that the threatened action of the defendants, if permitted, will work an irreparable injury to Welton, for which he has no adequate remedy at law. The appellants demurred to the petition on the ground that it did not state a cause of action. The court overruled the demurrer and entered a decree perpetually enjoining the board of county commissioners from establishing such private road on the lands of Welton. The case comes here on appeal.

The principal question in the case is the constitutionality

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of the sections of the statute recited above. If B's land shall be shut off from public highways by the land of A, and he shall refuse to allow B a private road across his, A's land, then this statute, against A's consent, takes a part of his land and transfers it to B, to be used as a private road by him, his heirs and assigns, forever. Section 21, article 1, of the constitution of the state provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The uniform holding of the courts is that such a constitutional provision as this is an implied prohibition on the power of the legislature to take the private property of A without his consent, even when compensation is made, and transfer it to B for his private use.

The supreme court of the state of New Jersey, in *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, declares: "This want of power in the legislature does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature. To justify the taking of the citizen's property by the legislature, the use for which it is appropriated must be a public use."

Speaking to this subject the eminent jurist, Cooley, says: "The right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer." (Cooley, Const. Lim. [6th ed.], p. 651:)

Now, is the use for which this statute authorizes the tak-

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ing of appellee's land a public or private one? Is the purpose of this law to take A's property and transfer it to B for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public, the law is good; if, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void; and, whether one or the other, is a question of law. To make the use public, it need not be for the benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate. (*Coster v. Tide Water Co.*, 18 N. J. Eq., 54.)

Section 4511, Revised Statutes of Ohio, provides: "The trustees of any township may, whenever in their opinion the same will be conducive to the public health, convenience, or welfare, cause to be established, located, and constructed, as hereinafter provided, any ditch within such township." Certain parties petitioned for the construction of a ditch across the lands of others under said statute. On the trial the court was requested to charge the jury as follows: "If you find that the petitioners \* \* \* are the only persons in any way interested in the location of the ditch, and that it would not be conducive to public health, convenience, or welfare to locate the ditch in question, then, and in that case, you should return your verdict against the proposed ditch." The court refused to give this instruction, and the case was taken to the supreme court for review, and that tribunal say: "The facts being ascertained, the question whether or not a ditch will conduce to the public health, convenience, or welfare, within the meaning of Rev. Stat., sec. 4511, so that it will be of public use, is a question of law." (*McQuillen v. Hatton*, 42 O. St., 202.)

In *Jenal v. Green Island Draining Co.*, 12 Neb., 163, was considered a statute of this state, authorizing the con-

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struction of levees, dikes, and drains, and the reclamation of wet and overflowed lands by incorporated companies. The act provided, among other things, that the company might appropriate any land, stones, timber, gravel, or other materials necessary for the right of way or construction, maintenance, or improvement of the proposed work by first paying into the county treasury of the county where the land is situate, for the use of the owner of the land, the amount of damage assessed by the appraisers who were appointed therefor. Chief Justice MAXWELL, speaking for this court, said: "The statute in question authorizes the entry upon lands, and construction of drains whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. \* \* \* This is an infringement of the right of private property and is unauthorized and void."

The general road law of this state, chapter 78, Compiled Statutes, 1893, confers on county boards of the several counties of the state general supervision over the public roads of the state, with power to maintain them; requires a petition for a public road to be signed by ten freeholders; fixes their width at sixty-six feet; makes the cost of their construction and maintenance a public charge; provides that when persons traveling with carriages shall meet on such roads, each shall turn to the right of the center thereof; prohibits all persons addicted to the excessive use of intoxicating liquors from being employed as drivers on said roads; prohibits the running of horses on such roads; the leaving in such roads, unhitched or unguarded, any horses or teams; and that the overseer of each road district shall annually cause furrows to be plowed on either side of all such roads, as fire guards. None of these provisions are found in this act in reference to private roads, and none

of these provisions apply to private roads. Had the legislature intended that these private roads should be for the public use, then, indeed, the entire private road act would be superfluous; but the law we have under consideration expressly provides: "Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever." (Sec. 52, ch. 78, Comp. Stats.) The fact that the legal title is not taken, but an easement created, does not render this law less objectionable; for what value is one's legal title if another have the possession and use forever? Marshall and Loder would acquire no greater estate to the land in question if Welton gave them an absolute warranty deed. The public have an easement in all public roads, while the legal title remains in the adjoining owner, but by this law no right in or to the private road is conferred on the public. This law is, and was intended to be, and act for the transfer of A's property against his consent, compensation being made to him, to B, his heirs and assigns, for their private use and convenience, and is, therefore, in conflict with the implied prohibitions of the constitution, and void.

In *Bankhead v. Brown*, 25 Ia., 540, the question of the constitutionality of a private road law was decided. By the statute considered in that case it was provided:

Section 1. Private roads may be laid out in the same manner as county roads, and the general road laws of the state as to the establishment of county roads are applicable, except that it is not necessary that any person but the applicant shall sign the petition.

Sec. 2. That the board of supervisors may appoint a commissioner to report upon the application, and requires a bond from the applicant to pay all costs and damages.

Sec. 3. That no such road shall be ordered to be opened until the costs and damages have been paid and the conditions on which it is established shall have been complied with by the applicant.

Sec. 4. That on the final hearing the board may receive petitions for and against the proposed road, hear testimony, and establish the road upon the payment of costs and damages, and upon such condition as to fences as to the board may seem just to all parties concerned.

It will be observed that the Iowa law is substantially the same as the one under consideration here, with the exceptions that the Nebraska statute contains no provisions allowing the board of county commissioners to receive petitions for and against the proposed road; and the Iowa statute has no provisions vesting the perpetual easement in the private road established in the party petitioning therefor.

*Bankhead v. Brown, supra*, arose out of an effort of Bankhead to have established a private road under the provisions of the Iowa law just quoted, across the land of Brown, in order to reach Bankhead's coal mine. The establishment of the private road was resisted by Brown on the ground that the law authorizing it was unconstitutional, in that it proposed the taking of private property for private uses. Dillon, C. J., delivering the opinion of the court, said: "With respect to the act, \* \* \* we are of opinion that roads thereunder established are essentially private, that is, are the private property of the applicant therefor, because, first, the statute denominates them 'private roads.' \* \* \* If the roads established thereunder were not intended to be private and different from ordinary public roads, there was no necessity for the act. Second. Such road may be established upon the petition of the applicant alone, and he must pay the costs and damages occasioned thereby and perform such other conditions as to fences, etc., as the board may prescribe. Third. The public are not bound to work or keep such roads in repair, and that is a very satisfactory test as to whether the road is public or private. Fourth. We see no reason, when such a road is established, why the person at whose instance this was done

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might not lock the gates opening into it or fence it up, or otherwise debar the public of any right thereto. Could not the plaintiffs in this case, after having procured the road in question, abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private if it is of such a nature that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it. If the act \* \* \* is valid, might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These considerations mark the great difference between such a road and a public highway and demonstrate the essential private character of the road."

In the following cases acts substantially like the Iowa act providing for the establishment of private roads, have been declared unconstitutional: *Nesbitt v. Trumbo*, 39 Ill., 110; *Diekey v. Tennison*, 27 Mo., 373; *Clack v. White*, 2 Swan [Tenn.], 540; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *Sadler v. Langham*, 34 Ala., 311; *Newell v. Smith*, 15 Wis., 111.

The language quoted above from the learned judge in reference to the Iowa law is applicable to the statute under investigation. The eminent jurist, commenting on the constitutional provision of the state of Iowa, "that private property shall not be taken for public use without just compensation," continues: "The limitation \* \* upon the right of eminent domain, or the power of the legislature to take private property for public use, is found in all, or nearly all of the state constitutions. Many of the questions growing out of this limitation upon the otherwise practically if not theoretically absolute power of the legislature to take the property of one for the benefit of the

many, have been settled by adjudication." And he deduces from the numerous authorities cited by him in the opinion the following propositions:

"1. The constitutional limitation above quoted prohibits by implication the taking of private property for any private use whatever without the consent of the owner.

"2. It forbids private property from being compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

"3. When the public exigencies demand the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.

"4. That what is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. But 'if a public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use.'"

We are entirely satisfied with the reasoning and conclusions of this opinion and follow it without hesitation. Statutes similar to the Nebraska law have been held invalid in the following cases: *Stewart v. Hartman*, 46 Ind., 331; *In re Albany Street, New York*, 11 Wend. [N. Y.], 149; *Osborn v. Hart*, 24 Wis., 89; *Crear v. Crossly*, 40 Ill., 175; *Sholl v. German Coal Co.*, 118 Ill., 427.

Counsel for appellants in their brief cite us to many authorities to sustain the validity of the law assailed as invalid in this case. In some of the cases cited the statutes were held good on the ground that the general public had a right to use the private roads provided for by the statutes. Such was the ground of the decision in *Shaver v. Starrett*, 4 O. St., 495, and *Denham v. County Commissioners*, 108 Mass., 202.

In *Sherman v. Buick*, 32 Cal., 242, the court sustained

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the constitutionality of a law very similar to our own, but did so by holding that although the statute denominated the road a 'private road,' it was in fact and in law a public road, under the control of the government, and open to every one who might have occasion to use it; and the court declared that "the phrase, 'private road,' is unknown to the common law; all roads are public." The opinion, as counsel say, is ably reasoned; but we do not think this court can say that all roads are public roads in this state. The legislature has said that all public roads shall be sixty-six feet wide, and by the law we are considering it is provided that private roads shall be fifteen feet wide. Evidently, then, the legislature has attempted to recognize two classes of roads. If Marshall and Loder had opened the private road they sought to across Welton's farm, and had been indicted under the criminal statutes for running their horses on a public road of the state, and the proof had shown that the running of their horses was on a private road established under this private road law, can any one doubt that the jury would have been rightly instructed to acquit them?

Counsel for appellants also insist that appellee has an adequate remedy at law by appeal from the order of the board of county commissioners, should it make an order establishing the road, and that therefore this case must be dismissed. The law being invalid, the case of the appellee resolves itself into an appeal, on his part, to a court of equity to enjoin the appellants from committing a threatened trespass. The supreme court of Illinois in *Poyer v. Village of Des Plaines*, 123 Ill., 117, lay down the rule in such case thus: "There are, however, two exceptions, clearly recognized, to the rule that courts of equity will not interfere to restrain trespasses, whether committed under the forms of law or otherwise, which are, first, to prevent irreparable injury; and, second, to prevent a multiplicity of suits. \* \* \* Before a court of equity will interfere to prevent a trespass upon this ground, 'the facts and circumstances

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must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy.'” In *Watson v. Sutherland*, 5 Wall., 74, the supreme court of the United States say: “The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the proceedings.” It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. The facts averred in the appellee’s petition show that the trespass threatened by the appellants, if committed, would cause appellee an injury, to the redress of which his legal remedy would be inadequate. The decree of the district court is

AFFIRMED.

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MARY H. SWARTZ, APPELLEE, V. SAMUEL C. DUNCAN  
ET AL., APPELLANTS.

FILED JANUARY 4, 1894. No. 5392.

1. **Review: APPEAL.** The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court, unless the finding and decree cannot be reconciled with any reasonable construction of the testimony. (*Gadsen v. Phelps*, 37 Neb., 590.)
2. **Principal and Agent: RATIFICATION.** A principal must repudiate the acts of his agent within a reasonable time after such acts come to his knowledge, or his silence and inaction will be deemed a ratification of the agent’s conduct. Accordingly, where S., in 1881, conveyed his farm and delivered possession of the same to C. in trust for S.’s use, and C., in February, 1883, sold and conveyed the farm to D., taking his notes

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secured by a mortgage on the farm for purchase price, and on February 20, 1883, C. sent the notes to S. and advised him of the sale and conveyance to D., and S. retained the notes and made no objection to the sale, either to C. or D., until October, 1888, when he brought suit to annul the contract of sale, *held*, that S. had ratified the sale and conveyance through C. to D.

3. The evidence relied on in this case to sustain the defense that the compromise or settlement pleaded herein had been procured by unfair means examined, and *held*, not to establish either fraud, duress, or undue influence.

APPEAL from the district court of Jefferson county.  
Heard below before BROADY, J.

*W. P. Freeman*, for appellants.

*Alfred Hazlett, Shelley L. Webb, and John Saxon*, contra.

RAGAN, C.

In the year 1881 Henry R. Swartz and wife conveyed eighty acres of land owned by them, and on which they resided, in Jefferson county, Nebraska, to Martha J. Carpenter, and in 1883 she and her husband, Solon B. Carpenter, conveyed this land to Samuel C. Duncan for an express consideration of \$700. Henry B. Swartz instituted this suit in the district court of Jefferson county in October, 1888, against Martha J. Carpenter, Solon B. Carpenter, her husband, Samuel C. Duncan, and Harriet A. Duncan, his wife, alleging, in substance, that defendants, in 1881, conspired together to obtain said land from plaintiff without consideration, and to carry out their fraudulent intention, informed plaintiff that a complaint had been sworn out for him, and that a warrant for his arrest for a criminal offense was then in the hands of the sheriff, and that plaintiff would be arrested and imprisoned if he remained in the country, and advised him to leave the state; that they greatly frightened plaintiff thereby, he being a timid man, and caused him to turn over to Martha J. Carpenter and her

husband all plaintiff's personal property, and to deed to said Martha J. Carpenter the land mentioned above without consideration, transported plaintiff to a railroad station outside of Jefferson county, and shipped him to the state of Illinois, and in a few days thereafter shipped plaintiff's wife and children to him; that plaintiff and his family have since resided in Illinois, and on account of their extreme poverty have been unable to return to Nebraska; that the Carpenters converted to their own use all of plaintiff's personal property; that the conveyance of the land to Duncan by the Carpenters was a part of the fraudulent scheme to defraud plaintiff. The prayer of the petition was for a decree that Duncan be decreed to reconvey the land to plaintiff and for an accounting of rents. Henry R. Swartz and his wife, Mary H., were, after this suit was brought, divorced, and Henry R.'s interest in the land and all his other property transferred to his wife, and she was substituted as the sole plaintiff in this case. The district court found the issues in favor of Mrs. Swartz and entered a decree canceling the conveyance from Swartz and his wife to Mrs. Carpenter, and from Mrs. Carpenter and husband to Duncan, and quieted and confirmed the title to said real estate in Mrs. Swartz. From this decree Carpenter and his wife and Duncan and his wife appeal.

There are three grounds relied upon by the appellants to reverse the decree.

1. That Duncan was an innocent purchaser of the land from Mrs. Carpenter without notice of the fact that Mrs. Carpenter held it in trust. Whether Duncan was an innocent purchaser,—that is, whether he bought this land without knowledge of the fact that Carpenter held it in trust for Swartz,—was a question of fact. The trial court found that Duncan purchased the land with knowledge of the fact that Carpenter held the land in trust for Swartz. After a careful study of the evidence, we are unable to say that this finding is wholly unsupported by competent testimony.

It would subserve no useful purpose to quote the evidence. The testimony does not impress us very strongly with the conviction that Duncan was actuated with a fraudulent purpose in these transactions, but we have only the lifeless record for a guide. We have not heard the living witnesses speak, nor observed them nor their conduct while testifying. The trial judge had all these opportunities. The conduct of Duncan in the premises,—that is, what he did and the part he took in sending Swartz out of the country,—was a circumstance susceptible of an innocent or guilty interpretation, and whether one or the other should have been, and doubtless was, determined from the extent of credibility given to the statements of the witnesses, who testified to the facts intended to establish the intent of the actor. “The supreme court, though trying a case *de novo* on appeal, will not disturb the finding of the district court, unless the finding and decree cannot be reconciled with any reasonable construction of the testimony.” (*Gadsen v. Phelps*, 37 Neb., 590.) The first exception of appellants to the decree must therefore be overruled.

2. The second point made by the appellants is that Henry R. Swartz, before being divorced from his wife, ratified the sale and conveyance made by the Carpenters to Duncan. It appears from the record that Carpenter and his wife conveyed this land to Duncan on the 7th of February, 1883, the consideration paid by Duncan being \$700, and paid as follows: A prior mortgage on the premises amounting, principal and interest, to some \$412, and for the remainder of the purchase money Duncan executed to Mrs. Carpenter his note of \$300, secured by a mortgage on the real estate. On February 20, 1883, Carpenter wrote a letter to Swartz advising him of the sale and conveyance of this land to Duncan; advised him of the price for which he had sold it to Duncan, and how the consideration was paid, and inclosed the purchase-money notes, unindorsed, to Swartz, and these notes were retained by Swartz. The mortgage secur-

ing these notes was never assigned or delivered to Swartz. In September, 1883, Duncan paid these notes to the Carpenters, and Mrs. Carpenter thereupon released the mortgage. There is no evidence that Swartz did or said anything towards repudiating this sale and conveyance until he brought this suit in 1888, at which time he brought the notes into court. After his receipt of the notes he sent them, in 1883 or 1884, to Messrs. Norval Bros., attorneys at law, Seward, Nebraska, for collection; and this firm sent them some time afterwards to one Claussen, a banker, at Alexandria, Nebraska, for collection. The letter, with the notes, came into the hands of one Gowdy, then an attorney at law at Alexandria. He kept them for some time, and finally, on the 15th of January, 1887, Messrs. Norval Bros., having regained possession of the notes, returned them to Swartz. During all this time Swartz made no effort to repudiate this sale and conveyance; he was personally acquainted with Duncan; had been Duncan's neighbor; knew that Duncan had bought the land of Carpenter; yet he did not, as a prudent man would have done had he been dissatisfied with the sale, return these notes to Carpenter and notify Duncan that he disapproved of the sale and conveyance of the land to him. All these years Duncan remained in possession, paying taxes, and making improvements on the land. Do these facts establish a ratification by Swartz of the sale and conveyance of this land by Carpenter to Duncan? We think they do. Swartz knew the land had been sold by his trustee or agent, Carpenter; knew to whom sold; knew the price paid, and had in his possession the evidences of it. Under these circumstances, if he was dissatisfied, it was his duty to speak, at least, if not to act, within a reasonable time. He remained silent; he remained inactive, so far as repudiating the acts of Carpenter; indeed, his only acts were directed to a confirmation of what Carpenter had done. Whether Duncan was an innocent purchaser,—that is, whether he purchased this land

from Carpenter knowing that he held it in trust for Swartz,—has nothing to do with the point under consideration. Duncan may have purchased with notice of Swartz's rights,—and the finding of the trial court compels us to assume that he did,—but Swartz, knowing this, could not remain silent all these years, until Duncan had changed his status, and then repudiate the sale. The second exception of appellants to the decree is sustained.

3. The third exception of the appellants to the decree is that Mrs. Swartz, after her divorce, settled and compromised the dispute in this case. The record shows that after Norval Bros. had returned the notes to Swartz they were put into the hands of one Gowdy, an attorney at Fairbury, Nebraska, and he instituted this suit in the name, as has before been stated, of Henry R. Swartz. While the action was pending in April, 1890, and after Swartz and wife had been divorced, Duncan and Gowdy effected a settlement of the matters in controversy in this suit, the terms of which were Swartz and wife were to quitclaim the land to Duncan in consideration of his paying \$300 and the costs of suit. A deed was accordingly made out and sent to the Swartzes in Illinois, with a statement of the terms and purposes of settlement. Mr. Swartz executed this deed, but Mrs. Swartz declined to execute the deed and make the settlement, and at once came to Fairbury. Here, in the office and presence of her attorney, after an interview with Duncan, and a consultation with some of her friends, who, she says, advised her to compromise the case, she, on April 28, 1890, executed the deed already signed by Mr. Swartz. Duncan thereupon paid over the \$300 and paid the costs of suit and received his quitclaim deed. Of the money paid for this settlement, Mrs. Swartz received only about \$112 from her attorney. After this had been done, about May 20, 1890, Mrs. Swartz filed a petition of intervention in this case, and some time afterwards the court set aside the dismissal of the case that had been entered in pursu-

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Swartz v. Duncan.

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ance of the settlement and allowed Mrs. Swartz to prosecute the action as plaintiff. From anything we have been able to find in the record this compromise or settlement made between Mrs. Swartz and Duncan was fairly made. Mrs. Swartz knew in Illinois of the terms of the proposed settlement and was dissatisfied with it. She comes to Nebraska. She knows at this time all that Carpenter and Duncan had both done. The suit to annul their action is pending. She meets Duncan and charges him, she says, with having purchased the land from Carpenter, knowing it was her husband's. She at first declines to accept the terms of settlement; leaves her attorney's office, remarking that she will, on her return, decide what she will do. She consults her friends. They advise her, she says, to make the settlement. She returns, signs the deed and accepts the money paid in settlement. The record does not show any fraud or deception practiced on her to procure this settlement. She was laboring under no mistake as to the facts. She was not old, infirm, weak-minded, or ignorant. Her evidence to parry this defense is that she was intimidated by her attorney, Gowdy, into agreeing to this settlement; that he betrayed her; that he was in a conspiracy with Duncan; that Gowdy threatened that if she did not execute the deed and carry out the terms of the proposed settlement, he had authority, as her attorney, to do so for her, and bind her, and would do so, and then she would get nothing; that, believing Gowdy had such authority, and that he would do as he threatened, she signed the deed, made the settlement, and accepted the money. There is no evidence in this record sustaining her theory that Duncan and Gowdy conspired together, nor does the evidence sustain her contention that Gowdy betrayed her. Assuming the other evidence of hers to be true, it does not establish that this settlement or compromise was brought about by duress or undue influence. The third exception of the appellants must therefore be sustained.

The evidence in this record establishes beyond all controversy that Martha J. Carpenter did not buy or own this land, but held the same in trust for Swartz, and had his authority to sell and convey it to Duncan as stated above; and the evidence also conclusively shows that about October 1, 1883, Duncan paid to the Carpenters \$300 for the balance of the purchase price of said land. This money belonged to Swartz. The Carpenters, however, converted it to their own use and have never paid it, or any part of it, over. They cannot be allowed to retain this money. It is true that they did not receive in cash quite the full amount of \$300 and accrued interest of \$16, as some \$80 were deducted by Duncan for the purpose of clearing up a cloud on the title; but the rents and profits of the land for the length of time it was held and used by the Carpenters were of as great value as the deduction made by Duncan, and, under the evidence, the Carpenters must be held to account for the full \$300, with seven per cent interest thereon from October 1, 1883.

The decree appealed from is reversed and the cause remanded with instructions to the district court to dismiss the case as to Samuel C. Duncan and Harriet A. Duncan, his wife, and to enter a personal judgment in this case in favor of Mary H. Swartz against Martha J. Carpenter and her husband for \$300, with interest thereon at the rate of seven per cent per annum from October 1, 1883, and to award immediate execution therefor, and tax the entire cost of this proceeding to the said Martha J. Carpenter and Solon B. Carpenter, her husband.

JUDGMENT ACCORDINGLY.

**JENNIE T. VOUGHT v. J. H. FOXWORTHY, APPELLANT,  
AND H. B. STRAUT, APPELLEE, ET AL.**

FILED JANUARY 4, 1894. No. 5275.

1. **Judicial Sales: APPRAISEMENT: MOTION TO VACATE.** Appraisers of property for sale under execution act judicially, and on motion to vacate such sale, the value fixed by them on the property appraised can only be assailed for fraud. Objection that the appraised value of the property is too high or too low should be made and filed in the case with a motion to vacate the appraisement before a sale occurs thereunder.
2. To justify the setting aside of a sale on the ground that the property was appraised too low, the actual value of the property must so greatly exceed its appraised value as of itself to raise a presumption of fraud in the making of the appraisement.

**APPEAL** from the district court of Lancaster county.  
Heard below before **TIBBETS, J.**

*Adams & Scott*, for appellant, cited: *Demaray v. Little*, 19 Mich., 244; *Capital Bank of Topeka v. Huntoon*, 35 Kan., 577; *Morris v. Robey*, 73 Ill., 462; *Sinnott v. Oralle*, 4 W. Va., 600; *Gould v. Gager*, 18 Abb. Pr. [N. Y.], 32; *Griffith v. Hadley*, 10 Bosw. [N. Y.], 587; *King v. Morris*, 2 Abb. Pr. [N. Y.], 296; *Seller v. Lingerian*, 24 Ind., 264; *Davis v. McGee*, 28 Fed. Rep., 867; *Carden v. Lane*, 2 S. W. Rep. [Ark.], 709; *Bean v. Hoffendorfer*, 2 S. W. Rep. [Ky.], 556; *In re Palmer*, 13 Fed. Rep., 870.

*B. F. Johnson, contra*, cited: *Neligh v. Keene*, 16 Neb., 407; *Crowell v. Johnson*, 2 Neb., 146; *Day v. Thompson*, 11 Neb., 123; *Wilcox v. Raben*, 24 Neb., 368.

**RAGAN, C.**

On the 9th day of October, 1890, the district court of Lancaster county, sitting in equity, rendered a decree of

38	790
39	215
38	790
44	181
38	790
145	603
38	790
46	476
38	790
49	65
49	278
50	722
51	228
51	535
52	105
52	363
53	620
54	66
54	232
55	446
38	790
56	63
56	211
38	790
58	21
58	118
58	303
58	607
58	670
38	790
60	8
38	790
62	373
62	840

foreclosure of a mortgage against lots 5 and 6, in block 230, in the city of Lincoln. The amount of the decree was \$1,200, and was to draw interest at the rate of ten per cent per annum from the date of its rendition. It was in favor of Jennie T. Vought and against Jefferson H. Foxworthy *et al.* September 28, 1891, an order of sale was issued, and on November 17, 1891, the land was sold at public auction by the sheriff to one H. B. Straut for \$350. The land was appraised at \$500. November 25, 1891, a motion to confirm the sale was filed by the purchaser and the complainant in the decree; and the court made an order requiring the defendants to the foreclosure proceedings to show cause on Monday, November, 30, 1891, why the sale should not be confirmed. On Tuesday, December 1, 1891, no objections to the confirmation of such sale having been made, the court duly confirmed it, ordered the sheriff to execute a deed to the purchaser of the property, and rendered a deficiency judgment against Jefferson H. Foxworthy and Alice Foxworthy for \$1,042.07, to draw interest at the rate of ten per cent per annum. December 2, 1891, Jefferson H. Foxworthy filed a motion to set aside the confirmation of said sale and said deficiency judgment on the grounds (1) that the confirmation and deficiency judgment were procured by the fraudulent practices of counsel for Mrs. Vought; (2) that the property was not appraised at anything near its actual value. The court overruled this motion and Mr. Foxworthy brings the case here.

In support of the first ground of his motion Foxworthy filed the affidavit of himself and one Wade, stating that prior and subsequent to the sale he had an agreement with Mrs. Vought and her counsel that Foxworthy should pay a certain sum of money in compromise of the decree. If Foxworthy did not make this payment prior to the close of the term of court then sitting, Vought's counsel should file his motion to confirm in time to procure a confirmation during the term then in session; that on Saturday, No-

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vember 28, 1891, Foxworthy sent by Wade a note to Vought's counsel. The note is as follows: "Dear Sir: What have you done as yet, if anything, about the confirmation of the sale in the Vought case? I am going out to my farm tomorrow and will not be in until Tuesday noon. Answer." That the counsel to whom this was addressed "told me (Wade) to tell Mr. Foxworthy that he had done nothing as yet except file a motion for confirmation, but that he would go up to the court house Monday and look after it;" that counsel for Vought had promised Foxworthy to keep him posted on what he (Vought's counsel) was doing and going to do in the case; that he relied on counsel's promise and understood from the message sent by Wade that counsel would take his order to show cause on Monday, if he (Foxworthy) did not make the compromise payment agreed on; that he was absent from the city when the sale was confirmed.

To support the second ground of his motion, that the property was appraised very much below its value, his affidavit fixed the value of the property as high as \$3,000 in trade; but no facts are offered showing, or tending to show, that the appraisers acted in bad faith, or that there was any fraud or deceit practiced by any one in regard to the appraisal.

The affidavits filed in opposition to this motion show that Mrs. Vought and her counsel, about the time the order of sale was issued, agreed with Foxworthy to take a certain sum in compromise of the decree if the same was paid before the sale of the land under the decree; that Foxworthy made no payment before the sale and did not appear thereat; that after the sale Foxworthy informed Vought's counsel that he (Foxworthy) was about to procure a loan of \$500 on the property from Zeigler & Ward for the purpose of making the compromise settlement; that Vought's counsel immediately called on Zeigler & Ward in regard to this and was by them informed that they would not make

a loan on this property; that counsel for Vought sent word on Saturday, November 28, to Foxworthy by Wade that the motion to confirm the sale was on file and would be called up on Monday, December 1, 1891, and that Mr. Foxworthy had better be present. The record does not disclose any offer or tender by Mr. Foxworthy to pay the amount agreed on in compromise at any time. We cannot say the court erred in overruling this motion. More than a year elapsed between the date of the decree and the sale. The entire proceedings were regular. Foxworthy knew on Saturday afternoon there was a motion on file to confirm the sale, and Wade told him that Vought's counsel said he would go to the court house Monday and see about it. Mr. Foxworthy ought not to have been misled by this. It was not intended to lull him into a feeling of security. The confirmation of this sale was not procured through sharp practice or unprofessional or discourteous conduct on the part of Vought's counsel. The record does not disclose when the term of court closed, but the sale was confirmed on the fifty-seventh day of the term; and no showing was made on the hearing of the motion to set the sale aside, that Mr. Foxworthy was then ready to carry out the compromise.

Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value alone is not sufficient cause for setting aside a sale in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment in the motion to set the sale aside of any fraudulent conduct on the part of the appraisers in making this appraisement; nor averment of any fraud or unfair means resorted

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to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside. (*Harris v. Gunnell*, 9 S. W. Rep. [Ky.], 376.) It remains to be said that the value of the property, as shown by the affidavits filed in support of the motion to set the sale aside, does not so greatly exceed its appraised value as to raise a presumption of fraud. Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement before the sale occurs. The party seeking the sale of the appraised property would thus have notice of the objections to its appraised value, and he could either proceed to sale and take his chances of the appraisement being finally set aside, or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made. The judgment of the district court is right and is

AFFIRMED.

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CHARLES W. LYMAN V. CITY OF LINCOLN ET AL.

FILED JANUARY 4, 1894. No. 5230.

1. Building Contracts with City: CONSTRUCTION: BUILDERS' BONDS. L. & S. contracted with the city of Lincoln to furnish the material and labor to erect for said city two engine

38	794
38	747
38	794
141	659
38	794
43	650
38	794
44	117
38	794
46	649
38	794
47	180
47	726
47	818
38	794
49	673
50	461
53	476
54	662

houses. They gave a bond to the city to faithfully perform all the terms of the contract, which provided: "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses." One L. sued the contractors and their sureties for lumber used in the construction of the buildings. The sureties demurred to the petition on the ground that it did not state a cause of action against them. *Held*, (1) That the clause quoted above from the contract was a promise on the part of L. & S. to pay for all labor and material furnished them in constructing said engine houses; (2) that the statement of L. in his petition, that L. & S. owed him for lumber furnished to and used by them in said buildings, was a sufficient averment of a breach of said bond; (3) that the awarding of the contract by the city to L. & S. was a sufficient consideration to support their promise to pay for the labor and material furnished them in the performance of said contract; (4) that the promise they made to the city of Lincoln was for the benefit of all persons who furnished labor and material used in said contract, and such persons could sue on said bond; (5) that the existence of an express statute or ordinance of the city of Lincoln was not necessary to the authority of the city to require of L. & S. a bond to pay their material-men and laborers; (6) that the demurrer should be overruled.

2. ———: PART PERFORMANCE: ACTION ON BOND: DAMAGES. A contractor who furnishes labor and material to a city under a contract which reserves to the city the right of cancellation is entitled, after a termination of such contract by the city, to recover from it the actual benefits the city has received from the contractor's partial performance, and this is found by ascertaining the reasonable worth to the city of such partial performance appropriated or received by the city at the time of such receipt or appropriation, and deducting therefrom all payments made to the contractor and all actual damages the city has sustained by his defaults.

ERROR from the district court of Lancaster county.  
Tried below before FIELD, J.

The facts are stated in the opinion.

*Leese & Stewart*, for plaintiff in error:

The petition states a cause of action against *McMurtry*

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and McBride. (*Sample v. Hale*, 34 Neb., 220; *Sepp v. McCann*, 50 N. W. Rep. [Minn.], 246.)

The evidence shows a strict compliance with the contract on the part of Layne & Sweet, except when the city waived performance. The finding of the court that the city rightfully terminated the contract is contrary to law. (*Mercer v. Harris*, 4 Neb., 82; *Fitzgerald v. Allen*, 128 Mass., 232; *Adams v. Hill*, 16 Me., 215; *Boettler v. Tendick*, 11 S. W. Rep. [Tex.], 499; *Linch v. Paris Lumber & Grain Elevator Co.*, 15 S. W. Rep. [Tex.], 213; *Barr v. Van Duyen*, 45 Ia., 228; *Lawson v. Hogan*, 93 N. Y., 39; *Snow v. Inhabitants of Ware*, 13 Met. [Mass.], 50; *Henderson Bridge Co. v. O'Connor*, 11 S. W. Rep. [Ky.], 18, 957; *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush [Ky.], 56; *Foster v. Woodward*, 6 N. E. Rep. [Mass.], 853; *South Fork Canal Co. v. Gordon*, 6 Wall. [U. S.], 561; *Grand Rapids & B. C. R. Co. v. Van Dusen*, 29 Mich., 431; *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Ia., 239; *Taylor v. Renn*, 79 Ill., 181.)

The contract was wrongfully annulled by the city. The plaintiff, as assignee of the contractors, is entitled to recover the full value of the work done, for extras and for damages for not being permitted to complete. (*Sanger v. Chicago*, 65 Ill., 506; *Guerdon v. Corbett*, 87 Ill., 272; 2 Sutherland, Damages, 519, 520.) Assuming the city rightfully put an end to the contract, the finding of the court was wrong. (*Graves v. White*, 87 N. Y., 463; *Martin v. Boyce*, 49 Mich., 122; 2 Jones, Lieus, sec. 1513.)

*John P. Maule*, for defendants in error *McMurtry* and *McBride*, cited: *Brennan v. Clark*, 29 Neb., 385.

*N. C. Abbott*, City Attorney, and *Abbott, Selleck & Lane*, for defendant in error City of Lincoln:

Where a contract is silent as to the time of performance, the law implies that it was to be performed within a rea-

sonable time. The contract was properly annulled. (*Tiljengren Furniture & Lumber Co. v. Mead*, 44 N. W. Rep. [Minn.], 306; *Driver v. Ford*, 90 Ill., 595; *Stone v. Harmon*, 19 N. W. Rep. [Minn.], 88; *Hart v. Barnes*, 24 Neb., 782.)

RAGAN, C.

Charles W. Lyman brought suit in the district court of Lancaster county against the city of Lincoln, Layne & Sweet, copartners, Joseph C. McBride, and J. H. McMurtry, and in his petition alleged: That on June 5, 1889, the city of Lincoln entered into a contract with Layne & Sweet, by the terms of which they agreed to furnish material and labor and construct for said city two buildings for the use of its fire department. The buildings were to be according to certain plans and specifications, made part of the contract; to be completed, one July 15 and the other August 1, 1889; the city was to pay for them \$5,968; payments to be made on monthly estimates of completed work furnished by the city's engineer; such payments to be eighty per cent of the estimate, and the remainder of the contract price to be paid when the buildings were completed and accepted by the city; that it was also provided in said contract as follows: "The contractors shall file with the board of public works receipts of claims from all parties furnishing materials and labor in the construction of such engine houses before the final estimate is paid and the work accepted from the hands of the contractors." That on the date of the execution of said contract said Layne & Sweet, as principals, and McBride and McMurtry, as sureties, in consideration of said contract between said city and said Layne & Sweet, made and delivered to said city a bond in words and figures as follows: "That the above mentioned John Layne and Charles A. Sweet shall well and truly execute all and singular the foregoing stipulations by them to be executed, or on default thereof we, jointly and severally,

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bind ourselves \* \* to pay the city of Lincoln all damages which may result from such default," etc. That the plaintiff furnished Layne & Sweet lumber and material used by them in the construction of said buildings for said city of the value of \$2,155.58, \$500 of which had been paid, leaving a balance due him on said account of \$1,655.58; that Layne & Sweet entered upon the construction of said buildings, the city afterwards waiving their completion at the time fixed therefor in said contract, and were prosecuting their construction with reasonable diligence and in all respects according to the contract, when the city of Lincoln, on September 6, 1889, wrongfully refused to permit Layne & Sweet to further prosecute the work, canceled said contract, took possession of the unfinished buildings, completed them, and appropriated to its (the city's) use the labor and materials performed and furnished by Layne & Sweet in the partial construction of said buildings, which labor and materials were of the value of \$4,000; that the city had previously paid Layne & Sweet on said contract \$2,400, and no more; that plaintiff was the owner by assignment from Layne & Sweet of their cause of action against the city of Lincoln arising out of this contract. Layne & Sweet made no appearance. McBride and McMurtry submitted to the petition a demurrer, on the grounds that the petition did not state facts sufficient to constitute a cause of action against them. The answer of the city, outside of the admission of the execution of the contract and bond, and the cancellation by the city of the contract, consisted of a general denial and an affirmative averment that the city had expended a larger sum in the building of said buildings, according to Layne & Sweet's contract, than they were to receive for their construction, and that Layne & Sweet were indebted to the city. The court sustained the demurrer of McBride and McMurtry and dismissed Lyman's suit as to them. Judgment was rendered by default against Layne & Sweet in favor of Lyman, and on the final hearing the court, sitting

without a jury, found the issues for and rendered a judgment in favor of the city of Lincoln, and Lyman brings the case here on error.

There are three points which we notice :

1. Did the court err in sustaining the demurrer of McBride and McMurtry? It is to be observed that there are in this petition three causes of action, though not separately stated: (a) Lyman sues Layne & Sweet on an account for lumber sold and delivered to them; (b) Lyman sues Layne & Sweet, as principals, and McBride and McMurtry, as sureties, on the bond they gave to the city of Lincoln for the faithful performance by Layne & Sweet of their contract with the city; and (c) Lyman, as assignee of Layne & Sweet, sues the city for the reasonable worth of the labor performed and material furnished and used by them in the partial construction of the buildings they undertook to build for the city under the contract, and which contract, it is alleged, the city wrongfully canceled. The clause, "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses," found in the contract between the city and Layne & Sweet, liberally and fairly construed, means that Layne & Sweet promised the city that they would make payment to those who furnished them material or labor on said buildings; and the sureties in their bond guaranteed that Layne & Sweet would perform this promise. The averment of Lyman in his petition, that Layne & Sweet still owed him a balance of \$1,655.58 for lumber which he had furnished them to use in said buildings, under their contract with the city, was a sufficient allegation of a breach by Layne & Sweet of their contract and bond. Counsel for the sureties contend that the waiver by the city of the time for the completion of said buildings by Layne & Sweet released the sureties. That might be correct were this a suit by the city against the sureties for a failure on the part of Layne

& Sweet to complete their work in the time fixed by the contract; but this waiver cannot be urged here against Lyman. A second contention of counsel for the sureties is: "The sum total of obligation of the sureties here is to pay the city of Lincoln the damages it may sustain by reason of Layne & Sweet's not filing receipts," etc. If this contention is correct, the clause referred to in the contract is meaningless. The city of Lincoln could suffer no damages by the failure of Layne & Sweet to pay for the labor or material used in the construction of these buildings; and no lien for such labor or materials could be asserted against such buildings. (*Ripley v. Gage County*, 3 Neb., 397.) But, the nature of the contract and bond considered, counsel's contention is too narrow a construction. Obviously, the city of Lincoln intended by this bond to protect from defaults of its contractors all those who might labor on or furnish material for its buildings. The petition assailed sets out no statute or ordinance authorizing the city of Lincoln to do this, but we do not deem such a statute or ordinance indispensable. The awarding of the contract to Layne & Sweet was a sufficient consideration to them and their sureties to support their promise to pay for this labor and material. The promise they made to the city of Lincoln was for the benefit of all who labored on these buildings and all who furnished material that was used in their construction; and since Lyman had furnished material to these contractors which was used in these buildings for the city, the bond inured to his benefit and he can maintain a suit thereon. (*Shamp v. Meyer*, 20 Neb., 223; *Cooper v. Foss*, 15 Neb., 515; *Stewart v. Snelling*, 15 Neb., 502; *Sample v. Hale*, 34 Neb., 220.) The court erred in sustaining the demurrer.

2. The second point made by counsel for Lyman is that the court erred in finding as a conclusion of fact that the city of Lincoln rightfully terminated its contract with Layne & Sweet. On July 30, 1889, the city engineer gave Layne

& Sweet an estimate for \$2,200. This estimate was approved by the board of public works and city council, and eighty per cent thereof paid. One of the buildings, known as the "F Street Building," was not finished at this time though by the contract it was to be completed July 15. When August 1st arrived, the other building was not finished as it should have been by the terms of the contract. The city did not at either of said dates exercise its right to terminate the contract by reason of such defaults on the part of Layne & Sweet; on the contrary it gave them the estimate of July 30 and paid it, and after August 1st permitted Layne & Sweet to continue the work. This conduct of the city waived on its part the time fixed by the contract for the completion of the work. August 1st having passed, the buildings remaining unfinished, the city not having annulled the contract by reason thereof, but having permitted Layne & Sweet to continue the work without any new agreement as to when it should be completed, the law then presumes a contract on the part of Layne & Sweet to build these buildings within a reasonable time. (*Driver v. Ford*, 90 Ill., 595; *Stone v. Harmon*, 19 N. W. Rep. [Minn.], 88.) Section 13 of the contract provided that if the contractors should neglect or refuse to comply with the instructions of the board of public works, then the city should have the right to annul and cancel the contract. Now there is evidence in this record that this work was not at any time prosecuted with due diligence; that the city constantly urged Layne & Sweet to push the completion of the buildings, which urging they disregarded; that when September arrived, neither of the buildings was ready, the work not progressing rapidly, and the engines, horses, and men of the fire department were housed in tents. Under these circumstances, the city, by the resolution of its mayor and council, annulled and canceled the contract and took possession of the partially completed buildings. The evidence supports the court's conclusions of fact, that Layne & Sweet

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did not comply with the reasonable instructions of the city to prosecute diligently the work; that the month of August was ample time in which to complete the buildings had the contractors done their duty; and that the city was justified in canceling the contract.

3. The third assignment of error is that the decree of the court, in that it found that the city of Lincoln is not indebted in any sum to Layne & Sweet, is contrary to the law of the case. It must be borne in mind that we are now considering the suit of Layne & Sweet in the name of their assignee, Lyman, against the city to recover the value of the labor and material done and furnished by Layne & Sweet under the contract. Counsel for the city contend, and the court below, it seems, held, that Layne and Sweet's measure of damages was the contract price for the buildings less the amount paid them on the contract, and less, also, the amount it cost the city to complete the work according to Layne & Sweet's contract. This rule is based on the mistaken assumption that this is a suit against the city on the contract, which it is not. This rule wrongfully assumes that the contract is in force; but the city canceled it. It cannot annul a contract for one purpose and keep it in force for another. Counsel for the city say: "The city then having the right to take the work out of the contractors' hands, and having done so, it had the right, both in law and under the special agreement of clause seven of the contract, to go on and finish the work and charge whatever it should fairly and honestly cost the contractors." The substance of this clause seven of the contract is that, if the contractors shall not furnish sufficient workmen or material for the rapid construction of the buildings, the city may purchase material and employ workmen on the buildings and charge the cost thereof to Layne & Sweet. The city did not avail itself of this clause of the contract. If Layne & Sweet did not prosecute the work on said buildings as speedily as they should, the city

(1) could have purchased material and employed men on the work and charged the same to Layne & Sweet, and (2) sue them and their sureties on their bond for a breach of contract, or (3) cancel the contract. It chose the latter course, and took what Layne & Sweet had done under it, and they sue for its value. What is the measure of their damages? In *Fitzgerald v. Allen*, 128 Mass., 232, it is said: "The result of the cases is that if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon account upon a *quantum meruit*, in which case the actual benefit which the defendant receives from plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence and its terms referred to upon the question of the real value to the defendant of the plaintiff's labor and materials. If the time of performance is extended very far beyond the time fixed by the contract, if the materials furnished are of a very different quality from that provided for by the contract, these facts have necessarily a bearing upon the real value of the services and labor. The original contract price, too, is an important element in determining the value of the labor and materials, and the proportion in value which the work done bears to the whole value of the contract labor and materials is also important in determining the *quantum meruit*." We think this case states the law correctly. Layne & Sweet did not voluntarily abandon or refuse to perform the contract, and they are entitled to recover from the city the actual benefits it has received from their partial performance. This actual benefit is found by ascertaining the reasonable worth to the city of the labor and materials fur-

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nished by Layne & Sweet and received and appropriated by the city, such value to be determined at the date of such receipt or appropriation, and deducting therefrom all payments made to Layne & Sweet and any actual damages sustained by the city by reason of any defaults of Layne & Sweet. Tried by this rule, the judgment of the court, that the city of Lincoln was not indebted in any sum to Layne & Sweet, is erroneous. The decree of the district court must therefore be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

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GEORGE C. WASHBURN, APPELLANT, v. MARY K.  
OSGOOD, APPELLEE.

FILED JANUARY 4, 1894. No. 4654.

38	804
57	746
38	804
61	875

**Judgments: EXECUTIONS: ATTORNEY AND CLIENT: SUBROGATION.** A. M. & Co. held a judgment against W. and instructed their attorney to collect the same by a levy upon and sale of W.'s land, if the attorney could thereby realize the money due on the judgment without A. M. & Co.'s having to become the purchasers of the land. The attorney had execution issued and levied upon W.'s land, and at the sale he purchased the land in the name of his wife at the full amount of the judgment, interest, and costs, paid the costs, and receipted the sheriff as A. M. & Co.'s attorney, for the amount of the bid. The sheriff reported the sale, and the same was confirmed and deed executed to the wife of the attorney. The attorney notified the general agent of A. M. & Co. of these proceedings and was given permission by the agent, because of threats made on the part of W. to set the sale aside, to hold the remittance a reasonable time. The attorney finally remitted to A. M. & Co. the amount of the W. judgment less some fees which he claimed they owed him in other cases. A. M. & Co. refused to allow the attorney these fees in the settlement and returned his remittance for that reason. Thereupon W., with actual knowledge of the levy upon and sale of the land, the confirmation of the sale and its

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conveyance by the sheriff to the attorney's wife, paid A. M. & Co. the amount of the judgment to satisfy which his land had been already sold, and brought suit to set aside the sale and quiet the title in himself. *Held*, (1) That the attorney acted in good faith and according to the instructions of his clients; (2) that neither the attorney nor his wife held the land as trustee for A. M. & Co.; (3) that the rights of A. M. & Co., against the attorney were those of a creditor against his debtor; (4) that the judgment held by A. M. & Co. against W. was satisfied and extinguished by the levy upon and sale of his land; (5) that the payment made by W. to A. M. & Co. was a voluntary one, and that W. was not thereby subrogated to the rights of A. M. & Co. against the attorney, nor did he, by such payment, acquire any right as against the attorney, his wife, or the land bought by her at such sale.

APPEAL from the district court of Johnson county.  
Heard below before BROADY, J.

*S. P. Davidson*, for appellant:

An attorney having control of a judgment for his client cannot, without the consent of his client, expressed or implied, become a purchaser of lands at a sale under execution issued thereon; and if he does so purchase, he becomes, like any other agent, a trustee for his client. Such a trust arises by operation of law and continues until barred by lapse of time, or until terminated by an election to ratify the purchase, thus giving it validity. (*Pearce v. Gamble*, 72 Ala., 341; *Baker v. Humphrey*, 101 U. S., 494; *Henry v. Raiman*, 25 Pa. St., 354; *Zeigler v. Hughes*, 55 Ill., 288; *Harper v. Perry*, 28 Ia., 57; *Wheeler v. Willard*, 44 Vt., 640; *Case v. Carroll*, 35 N. Y., 385; *Weeks, Attorneys*, secs. 268-277; *Yerkes v. Crum*, 49 N. W. Rep. [N. Dak.], 423; *Cunningham v. Jones*, 37 Kan., 477.)

*Cobb & Harvey* and *Daniel F. Osgood*, contra.

RAGAN, C.

George C. Washburn brought this suit in the district court of Johnson county against Mary K. Osgood, and

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alleged in his petition that he was the owner and in possession of a certain piece of land in Johnson county, and that on the 18th day of March, 1889, one D. F. Osgood, an attorney of this court, without authority of or from Aultman, Miller & Co., caused an execution to issue to satisfy a judgment in favor of Aultman, Miller & Co. against the plaintiff, a transcript of which judgment was filed in the district court of said Johnson county; that Osgood caused said execution to be placed in the hands of the sheriff of said Johnson county, who levied the same upon the land of plaintiff; that a sale of said land was made by the sheriff under such execution, and that he struck off and sold said lands to the defendant, she being then the wife of said Daniel F. Osgood, for \$125, which sum was bid at said sale by the said Daniel F. Osgood for his wife; that prior to said sale the lands were appraised at \$1,200; that prior incumbrances on the land at the time did not exceed \$960; that the value of plaintiff's interest in the lands was at the time not less than \$240; that said Daniel F. Osgood caused the sale to be confirmed and the sheriff to execute to his wife, the defendant, a deed for said lands; that neither the said defendant nor her said husband paid the amount bid for said land at the sale thereof; that all the proceedings, from the issuing of said execution to the confirmation of said sale, were done without the knowledge, consent, or authority of Aultman, Miller & Co., who owned the judgment; that plaintiff had since paid said judgment and the same had been released; that plaintiff had offered to pay the defendant and her husband all their legitimate expenses and costs paid out by them, and requested them to convey the land to plaintiff, which the defendant had refused to do; that plaintiff never discovered that the issuance of said execution and the making of said sale were without the authority of Aultman, Miller & Co. until after the sale was confirmed. The prayer of the petition was that the sale might be set

aside and the title of the lands quieted and confirmed in the plaintiff. The answer averred that the execution under which the land was sold was issued under the direction of Aultman, Miller & Co. and the sale duly confirmed in open court; that plaintiff was actually notified of the time and place of the sale; that defendant offered Washburn, after the sale, to reconvey the land to him. The court rendered a decree dismissing Washburn's case, and he comes here on appeal.

The material issue in the case is whether D. F. Osgood, husband of the appellee, in having the execution issued and levied upon this land, and the same sold to satisfy the judgment of Aultman, Miller & Co. against Washburn, was an intruder, or was acting by authority of Aultman, Miller & Co. To this point the record contains the following evidence: That on August 21, 1888, Aultman, Miller & Co., in the county court of Pawnee county, obtained a judgment against Washburn for \$80.90 and costs; that on October 26, 1888, a duly certified transcript of this judgment was filed in the office of the clerk of the district court of Johnson county; that in February, 1889, D. F. Osgood had in his hands some business in the nature of collections or claims for Aultman, Miller & Co. On the 2d day of February, 1889, he wrote Aultman, Miller & Co. in reference to these claims, and in said letter said to them: "There is a transcript on file here, from Pawnee county, of yours against G. C. Washburn. Would you like me to attend to that for you? If so, please answer soon." On February 21, 1889, Aultman, Miller & Co. wrote Osgood in reply and said: "Yours of the 2d received in regard to sundry claims in your hands. You say there is a transcript on file there from Pawnee county, judgment taken against G. C. Washburn. We would be very glad to have you take charge of this matter for us; and if so, please advise us in your correspondence in reference to this judgment." March 19, 1889, D. F. Osgood wrote the following letter to Aultman, Miller & Co.:

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"TECUMSEH, NEB., March 19, 1889.

"*Aultman, Miller & Co., Akron, Ohio*—DEAR SIR: We have to-day had an execution issued against G. C. Washburn. He has land in this county, and there is no doubt but the collection can be made with some trouble and expense. Perhaps it would be well for you to notify Story & Story, of Pawnee City, that the matter is in my hands, and am proceeding to collect.

"Yours truly,

D. F. OSGOOD."

April 3, 1889, Aultman, Miller & Co. wrote to Osgood another letter as follows:

"AKRON, OHIO, April 3, 1889.

"*D. F. Osgood, Esq., Tecumseh, Neb.*—DEAR SIR: We are just in receipt of a letter from Story & Story, attorneys at Pawnee City, in answer to ours of March 27, in reference to your action in the issuing of an execution on the judgment transcribed to your county by them against G. C. Washburn. They have rendered us a bill for services rendered up to date, and leave it for us to say whether they shall go ahead with the case or drop out and let you finish it for us. We have decided upon the latter, and this day pay them for their services they have rendered us in this case. You will now proceed to get the money for us out of this land. We are sorry, however, that you have advertised this land for sale, because we were in hopes that the expense of this could be avoided and Mr. Washburn induced to pay this judgment without going to that expense. If it is not too late yet to do this, we want you to do so and save this extra expense. Are there any other incumbrances upon this land? If there are, we don't want you to sell this land unless you are sure you can get the money and take up prior claims. Let us hear from you by return mail and oblige.

"Yours truly,

R. H. WRIGHT,

"*Tr. Leohner.*"

April 9, 1889, Osgood wrote Aultman, Miller & Co. that the land in controversy had mortgages on it for \$886, and that he, Osgood, would see that they, Aultman, Miller & Co., did not have to buy the land and that they got their money on their judgment. The land was sold at public auction by the sheriff April 24, 1889, and bid in by the appellee. Sale was confirmed and deed made to her May 8, 1889. D. F. Osgood paid the costs of the sale and receipted to the sheriff in full for Mrs. Osgood's bid, which was more than the execution called for; that is, more than the amount of Aultman, Miller & Co.'s judgment and interest and the costs of the sale. We have quoted this evidence somewhat at length and contrary to our usual custom, and we do this because the correctness of the conduct of an attorney is challenged in this suit. Not only does the evidence not sustain appellant's allegations in his petition, but it affirmatively shows, and that without contradiction, that D. F. Osgood had authority from Aultman, Miller & Co., as their attorney, to collect this judgment against Washburn by a levy upon and sale of the land in suit herein. This is sufficient to dispose of this appeal; but it is alleged in his petition by Washburn that neither the appellee nor her husband paid the amount bid for the land at the sheriff's sale. This is not a matter to the prejudice of or of which Washburn can complain. The sheriff could only sell the land for cash. D. F. Osgood receipted in full to the sheriff for the amount of the judgment and interest, and he did this as Aultman, Miller & Co.'s counsel, and at once became their debtor for the amount. His receipt estops him from saying the sheriff did not pay him the amount of his client's debt made by the levy and sale under this execution. The report of the sale by the sheriff estops him, as against Aultman, Miller & Co., from alleging he was not paid the bid; and while he and the sureties on his official bond might be liable to Aultman, Miller & Co. for the amount realized by the sale of the

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land, nevertheless the proceedings operated to satisfy the judgment of Aultman, Miller & Co. against Washburn.

The learned counsel for appellant contends "that an attorney having control of a judgment for his client cannot, without his client's consent, become a purchaser of land at a sale under execution issued thereon, and if he does so, will hold the land so purchased as trustee for his client." We think the rule as stated by counsel has many, very many, exceptions, and is too broadly stated. But suppose it entirely correct. How does that help appellant? Aultman, Miller & Co. are not seeking to have Mrs. Osgood declared their trustee in her holding of this land, and their own evidence is that they did not wish their attorney to sell the land under the execution, if such sale would result in their having to become purchasers of the land. Washburn, because he paid the amount of the judgment and interest to Aultman, Miller & Co., is not therefore entitled to have this sale set aside nor to be subrogated to their rights. Washburn made this payment voluntarily, with full knowledge that the land had been sold, the sale confirmed, and a deed made to the appellee; that is, he paid to Aultman, Miller & Co. a debt that he knew, or was bound to know, had already been paid by the sale of his land. If Washburn supposed he was still indebted on this judgment to Aultman, Miller & Co., he has never pleaded nor proved such supposition, and it would not enable him to invoke successfully, in this case, the doctrine of subrogation had he done both. In *Ætna Life Ins. Co. v. Middleport*, 124 U. S., 534, the supreme court of the United States say: "The doctrine of subrogation in equity requires, first, that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and second, that in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the

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debt. \* \* \* The right is never accorded in equity to one who is a mere volunteer in the paying of a debt of one person to another." It is evident that Washburn has not brought himself within this rule, and on no other theory than that of subrogation can his case be maintained. But if he were entitled to be subrogated to the rights of Aultman, Miller & Co. against D. F. Osgood, the only right Aultman, Miller & Co. have against D. F. Osgood is, not the right to regard him or his wife as holding this land as their trustee, but the ordinary right of a creditor against a debtor.

There is evidence in the record showing that D. F. Osgood did not account to and pay over to Aultman, Miller & Co. the amount realized on the Washburn judgment; but there is also evidence that appellee authorized her husband to use a sum of money belonging to her and in his hands to purchase this land; that D. F. Osgood did so; that he advised Aultman, Miller & Co.'s agent that he, Osgood, had the money on the Washburn judgment and was, by the agent, given permission to hold it a reasonable time, as Washburn was threatening to institute proceedings to set aside the sale; that Osgood finally remitted the amount of the judgment and interest to Aultman, Miller & Co., deducting therefrom the amount of certain fees owing him by Aultman, Miller & Co. in other matters; that Aultman, Miller & Co. refused to accept the amount remitted by Osgood, but not on the ground that he had not their authority to collect the Washburn judgment, by sale of the land, but on the ground of fees deducted in other cases; that they returned Osgood's remittance to him; and that they did not return it to him. But whatever may be the materiality of this evidence, after a finding that D. F. Osgood acted in the premises by authority of Aultman, Miller & Co., and as their attorney, it, and the credibility and weight thereof, and the inferences and conclusions to be drawn therefrom, were for the trial court. The decree of the district court is right and is

AFFIRMED.

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## ART E. ALEXANDER V. WILLIAM H. SHAFFER.

FILED JANUARY 4, 1894. No. 5389.

38	812
41	276
38	812
42	400
43	497
38	812
54	16
54	737
39	812
56	653

1. **Tax Liens: FORECLOSURE: PLEADING.** A brought suit against B and others to foreclose tax liens. B, in 1891, answered averring that she had purchased portions of the premises in controversy in 1870 and in 1871 for taxes, the last payment being made in 1874, and asking that her title, interest, and claim be decreed superior to A's. *Held*, first, that treating the answer as setting up title in B under the tax sales and deeds issued thereunder, it failed to state any defense against A's petition to foreclose liens for subsequent taxes; and, second, viewed as an assertion of tax liens, they appeared on the face of the answer to be barred by the statute of limitations.
2. **An action to foreclose tax liens must be brought within five years after the expiration of the time to redeem.** *Helprey v. Redick*, 21 Neb., 80; *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327, followed.
3. **Statute of Limitations: TAX LIENS.** When land has been sold for taxes and a suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself.
4. ———: ———: **PRIORITY.** The holder of tax certificates, whose lien is barred by the statute of limitations, has no equity as against the holder of subsequent tax liens whereby he can require such subsequent lienor to discharge the barred liens or admit their priority as a condition for foreclosing his own.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

*S. P. Vanatta*, for plaintiff in error.

*Beeson & Root*, contra.

IRVINE, C.

Shaffer, the defendant in error, brought a suit in the district court of Cass county against the unknown heirs of Joseph Throckmorton, the plaintiff in error Art E. Alex-

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ander, and others, the object of which was to foreclose tax liens upon certain property in that county. The petition alleged as to a portion of the property covered by plaintiff's lien that Art E. Alexander claimed to have some lien on or title to the same, but averred that such title or lien was junior to that of the plaintiff. Alexander made default and a decree was rendered in accordance with the prayer of the petition, fixing the plaintiff's lien and finding that the plaintiff in error had no lien upon the premises. The taxes for which the plaintiff below claimed a lien were taxes for 1885 and subsequent years, and were paid at different periods between 1886 and 1890. The suit was begun September, 1890. Upon the 9th of February, 1891, the plaintiff in error filed a petition to set aside the decree and for leave to answer. A demurrer was filed to this petition, which was overruled, and the decree vacated so far as to allow the plaintiff in error to answer, setting forth her claim. An answer was then filed by the plaintiff in error, alleging that she claimed an interest in certain of the property described in the original petition; that a portion of such property she purchased September 4, 1871, at tax sale for the taxes of 1870, and that a portion she purchased at tax sale September 6, 1870, for the taxes of 1869, and that she had paid subsequent taxes on this property, the last payment being made May 1, 1874. The different taxes and dates of payment are set out at large in the answer. The answer further alleged that August 5, 1873, a tax deed was made for the lot sold in 1871, and that on May 8, 1874, a deed was made for the lot sold in 1870. The answer then averred that her title and claim was superior to that of Shaffer, and that Shaffer bought with notice of her interest. There was a prayer that her "title, interest, and claim" be decreed superior to that of Shaffer, and for general relief. A demurrer was filed to this answer, which was sustained and judgment entered accordingly. From this judgment error is prosecuted.

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The answer lacks much in certainty, but however it may be construed the judgment of the district court is right. If it is to be taken as pleading title in the plaintiff in error under her tax deeds issued in 1873 and 1874, it failed entirely to present a defense to plaintiff's petition, for the reason that it made no denial of the facts set out in the petition establishing a subsequent lien for taxes, and notwithstanding the answer, the plaintiff on his petition would still be entitled to the relief granted him in the original decree. If, on the other hand, the answer be construed as setting up a tax lien superior to that of Shaffer, it is still fatally defective. The answer shows on its face that the last payment of taxes was made in 1874, more than five years before the original action was begun, to say nothing of the time of filing the answer. The time of redemption expired as to part of the property in 1872, and as to the rest in 1873. An action to foreclose tax liens must be brought within five years after the expiration of the time to redeem. (*Helphrey v. Redick*, 21 Neb., 80; *Parker v. Matheson*, 21 Neb., 546; *D'Gette v. Sheldon*, 27 Neb., 829; *Warren v. Demary*, 33 Neb., 327.)

Plaintiff in error says, however, that she is not in court prosecuting an action to foreclose a lien, but merely in defense of Shaffer's action, and that the maxim that "He who seeks equity must do equity," is to be applied; that Shaffer must be required either to admit the seniority of her lien, or else to pay it, as a condition of his obtaining relief. This claim raises two questions: First—Does the subsequent tax sale cut out a former one for prior taxes? Second—If it do not, should the subsequent tax lienor, after the expiration of the period of limitations upon the former tax sale, be required to admit or discharge the prior lien? The conclusion reached upon the second question renders a decision of the first unnecessary. It was held in *Wygant v. Dahl*, 26 Neb., 562, that where the owner of property institutes an action *quia timet* to remove the cloud cast by a

tax title upon his property, he must, as a condition of relief, do equity by paying the holder of the tax title the taxes paid by him, with interest. Two observations are to be made upon this case. The first is that the decision was based partly at least upon the duty of the owner to pay the taxes when they became due. This is evident from the following language from the opinion: "He comes into a court of equity asking relief from consequences fairly traceable to his own failure to discharge a common duty which the state requires of all lot owners." Second—The opinion also laid stress upon the fact that the statute provides that "taxes upon real property are hereby made a perpetual lien thereupon," and the opinion further states that "this right and lien is recognized as unaffected by the lapse of time." But in the subsequent case of *D'Gette v. Sheldon* the following language is used: "But it may be said that the statute declares taxes upon real estate to be a 'perpetual lien,' and therefore they can be enforced at any time. This provision of the statute, however, is to be construed in connection with that providing for a sale of the land at a specified time for the taxes due, and if not redeemed after notice to that effect within two years thereafter, then the tax purchaser may either take a tax deed or foreclose his tax lien. In either case, if he seeks the aid of a court of equity to enforce his lien, he must do so in five years. The word 'perpetual,' therefore, was not intended to continue the delinquent taxes in force against real estate after the statute had barred a right of action thereon. The lien conferred by the statute is fixed upon the land itself, and is primary, overriding all other liens, since a sale thereunder, if duly made, would extinguish all other claims, and the word 'perpetual' seems to be used in that sense;" and in the syllabus it is said that "it was not intended to continue a tax lien in force after the remedies to enforce it had ceased." Section 180 of the revenue law provides that "if the owner of any such certificate shall fail or neglect either to demand a deed

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thereon or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto and all other persons, and as against the state, county, and other municipal subdivisions thereof." It seems, therefore, established by the statute and by the later decisions of this court that the limitation fixed in the revenue law is not merely a limitation as to the right of action, but it is a limitation upon the duration of the lien itself, and that upon the expiration of the period it is not merely the remedy to enforce the lien which expired, but the lien itself is extinguished absolutely.

The maxim that "He who seeks equity must do equity" has never been so applied as to justify a court in imposing arbitrary conditions in order to carry out what, in the individual opinion of the chancellor, would amount to substantial justice between the parties. The rule only requires the plaintiff to do "equity;" that is, to do what upon established legal principles he should be required to do. It has sometimes been applied in cases where the defendant was not in a position to affirmatively seek relief himself, but the vast preponderance of authority is that the maxim should never be applied so as to require that the plaintiff should perform an act not devolved upon him by established legal or equitable principles. (See 1 Pomeroy, Equity Jurisprudence, sec. 385 *et seq.*, and cases there cited.) In this case the plaintiff in error has not only lost her remedy to enforce her lien, but has lost the lien itself, so that there is no charge upon the land which a court can require to be paid. Moreover, there never was any duty devolving upon Shaffer to pay the taxes which were paid by plaintiff in error. He was not the owner of the land and not chargeable with those taxes, and if she had a claim upon the land, it was her duty to pay them and not to per-

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State v. Kendall.

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mit the land to be subsequently sold and subsequent taxes to be paid by Shaffer.

AFFIRMED.

38	817
52	431

STATE OF NEBRASKA V. NERIAH B. KENDALL ET AL.

FILED JANUARY 4, 1894. No. 5435.

1. **Obstruction of Water-Courses: INFORMATION.** An information sufficiently charges an offense under section 228 of the Criminal Code, where it charges the erection and keeping up of a dam in a stream whereby an artificial pond is raised and stagnant water is produced, whereby the air was, and now is, corrupted, offensive, and unwholesome, and manifestly injurious to public health and safety.
2. It is not a fatal defect in an information that it charges an offense with unnecessary particularity.
3. Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments, the state should, upon motion, be permitted to strike out such words.
4. When an information proves upon trial to be defective, the trial judge should inquire as to whether probable cause exists for holding the defendant, and in the exercise of a sound legal discretion may then either discharge him from custody or recognize him to answer at the next term of court.

EXCEPTIONS to the decision of the district court for Lancaster county, HALL, J., presiding. Filed by leave of the supreme court under the provisions of section 515 of the Criminal Code.

*N. Z. Snell, County Attorney, and Thomas Ryan, for the state.*

*Charles O. Whedon, for defendants.*

## IRVINE, C.

The defendants were informed against for that they, "on the 18th day of November, 1889, and continuously from that time until the 15th day of May, 1891, did and now do unlawfully and injuriously keep up a mill-dam across a stream of water known as 'Salt creek,' in said county and state, and thereby raised and now raise by means of the keeping up of said mill-dam an artificial pond which is situated near and adjacent to a common highway and the dwelling houses of divers persons who occupy the same with their families; and that the said artificial pond so raised by said mill-dam as aforesaid produced, and now produces, stagnant, corrupted, and impure waters, whereby the air in and around said dwelling houses and highway, and over and for a long distance around said artificial mill pond and stream known as 'Salt creek,' became, was, and now is corrupted, infected, offensive, and unwholesome, and manifestly injurious to the public health and safety, to the common nuisance of all the people." To this information a plea of not guilty was entered, and upon the trial the defendants objected to the introduction of any testimony for the reason that the information did not state facts sufficient to constitute any offense punishable by the laws of the state. This objection was sustained. Thereupon the state asked leave to strike from the information the words "whereby the air in and around said dwelling houses and highway over and for a long distance around said artificial mill pond and stream known as 'Salt creek' became, was, and now is corrupted, infected, offensive, and unwholesome." This motion was overruled. Thereupon the state asked leave to file an amended information, which would in substance be the same as the original, with the last words quoted stricken out. This motion was overruled. Finally, the state asked that the defendants be required to enter into a recognizance to appear on the first day of the

next term of court, and not to depart without leave, and to abide the further order and judgment of the court. This motion was also overruled. The court then instructed the jury to find for the defendants, which was done. The state brings the case here upon exceptions according to the statute.

The first question presented is as to the sufficiency of the information. Section 228 of the Criminal Code is as follows: "If any person shall build, erect, continue, or keep any dam or other obstruction in any river or stream of water in this state and thereby raise an artificial pond or produce stagnant waters which shall be manifestly injurious to the public health and safety, every person so offending shall be fined," etc. We think that the information stated an offense against this statute. The argument is first made that the information did not state that the pond was manifestly injurious to public health and safety, but that because of the pond the air became so. This is a clinging to the bark. By section 251 of the Criminal Code it is provided that every law upon the subject of crime shall be construed according to the plain import of the language without regard to the distinction usually made between the construction of penal laws and laws upon other subjects. The gist of the offense created by section 228 is the creation or maintenance of an artificial pond or stagnant waters to the manifest injury of the public health and safety. The means by which such waters may become so manifestly injurious may be varied. Usually in charging a statutory offense it is sufficient to follow the terms of the statute. The information would have been sufficient had it charged the erection of the dam whereby an artificial pond and stagnant waters were created to the manifest injury of the public health and safety, without charging the manner in which public health and safety were affected. It would be a narrow and indefensible construction of the statute to say that in order to constitute the offense, the waters themselves must be directly injurious to public health

or safety. If such injury results directly or indirectly from the acts complained of, the offense is complete, and the averment in the information of the means by which the waters became so injurious, while it might require proof according to the averment, did not vitiate the information, and was to the advantage of the accused rather than to his prejudice. Section 412 of the Criminal Code provides that no indictment shall be deemed invalid for any surplusage or repugnant allegation where there is sufficient matter alleged to indicate the crime or person charged nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. It is next argued that the information was defective because charging the erection of a mill-dam. Chapter 57 of the Compiled Statutes provides for the erection of mill-dams, whence it is said that the erection of a mill-dam being a lawful act, section 228 of the Criminal Code cannot refer to mill-dams. Chapter 57 of the Compiled Statutes, referred to, provides for an inquest by a jury. The jury is required to inquire, among other things, whether the health of the neighborhood will be injured by the stagnation of water, and whether such injury can be prevented; and by section 12 of that chapter the court is required to refuse permission to build such mill-dam if it appears that the health of the neighborhood will be affected. It is not therefore every mill-dam which is lawful, but the right to construct a mill-dam is subject to this qualification, among others, that it must not amount to a public nuisance injurious to health. The provision of the Criminal Code, already referred to, requiring a reasonable, and forbidding a strict, construction of penal statutes, requires that we should apply section 228 of the Criminal Code to mill-dams as well as to other dams, provided they are manifestly injurious to public health and safety. We therefore think that the information charged an offense and that the court should have overruled the objection to the evidence. What we

have already said disposes of the two exceptions which go to the overruling by the court of the state's motion for leave to strike out the words already referred to, and to amend the information. We have already said that an information omitting those words would have been sufficient. Had they been of such a nature as to negative the other averments, it is probable that the state ought not to have been permitted to strike them out, but inasmuch as they were entirely surplusage, the state should have had such leave.

The only other question of importance is the refusal of the court to require that the defendants should be held to bail after their objections to the evidence were sustained. Section 480 of the Criminal Code provides that when it shall appear at any time before the verdict that a mistake has been made in charging the proper offense, the accused shall not be discharged if there appear to be good cause to detain him in custody, but the court must recognize him to answer to the offense on the first day of the next term of said court; and section 481 provides that when a jury has been impaneled in a case contemplated by the preceding section, such jury may be discharged without prejudice to the prosecution. The latter section shows that the former is intended to apply, not only where the defect is taken advantage of before trial, but that it also applies to defects objected to upon the trial and before verdict. The words of section 480, limiting the right to recognize the defendants to cases where there appears to be good cause to detain him, show that something is left to the discretion of the trial court. There is no reason why a defendant held to answer for a criminal offense should be forever discharged because of a formal defect in the indictment or information; and for this reason the trial judge is permitted, in the exercise of a sound legal discretion, either to discharge the defendant or to recognize him to appear at the next term of court. He becomes in such a case a *quasi*-examining

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Badger Lumber Co. v. Mayes.

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magistrate. In this case no evidence at all affecting the merits of the case had been received. It would seem that the court should have proceeded, even had the information been defective, far enough to ascertain whether there was probable cause for a prosecution under a proper information. In a case where it appeared that a defective information could not be remedied in conformity with evidence it would undoubtedly be proper for the court to absolutely discharge the defendant. As there was no evidence received in this case we cannot say that the court abused its discretion. The error lay farther back, to-wit, in excluding the evidence offered. All that we can do in passing upon this exception is to say that it becomes the duty of the trial judge, when an information is found defective, to make inquiry as to the probable guilt of the accused of an offense which might properly be charged against him, and after such inquiry, to exercise his discretion as to discharging the person or holding him to answer at the next term of court.

EXCEPTIONS SUSTAINED.

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BADGER LUMBER COMPANY, APPELLEE, v. WILLMER  
MAYES AND NEW HAMPSHIRE FIRE INSURANCE  
COMPANY, APPELLANTS, ET AL., APPELLEES.

FILED JANUARY 4, 1894. No. 5056.

1. **Bill of Exceptions: REVIEW.** Where, upon an inspection of the bill of exceptions, palpable omissions appear, and the bill is so illegible and so unsystematically arranged that an intelligent examination is impracticable, the supreme court will upon review assume that there was evidence sufficient to sustain the findings of the trial court upon questions of fact.
2. **Mechanics' Liens.** Where one supplies lumber to a contractor for the erection of a building upon land of a third person with

38	822
53	286
38	822
57	653
57	654

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the understanding between the vendor and vendee that it shall be used in the construction of such building, and delivers it to the vendee at a place other than the premises where the building is constructed, and the vendee there manufactures such material into another form and so uses it in constructing such building, the vendor is in such case entitled to a mechanic's lien upon the premises.

3. **Time Lien Attaches.** As to whether a lien so acquired could antedate the actual delivery of the manufactured articles upon the premises where the building is constructed, *quære*.

APPEAL from the district court of Lancaster county.  
Heard below before HALL, J.

*Lamb, Ricketts & Wilson*, for appellants Mayes Bros.:

Persons who furnish lumber and materials to manufacturers, to be made up into articles used in the construction of buildings, cannot obtain liens against the buildings in which such articles are used. (*Great Western Mfg. Co. v. Hunter*, 15 Neb., 32; *Pitts v. Bomar*, 33 Ga., 96; *Foster v. Dohle*, 17 Neb., 631.)

*Harwood, Ames & Kelly*, for appellant New Hampshire Fire Insurance Company:

The materials mentioned in the second cause of action are not the proper subject of a lien. (*Horton v. Carlisle*, 2 Disney [O.], 184; *Arnold v. Budlong*, 11 R. I., 561; *Bennett v. Shackford*, 11 Allen [Mass.], 444; *Choteau v. Thompson*, 2 O. St., 114.)

*Charles E. Magoon*, for appellee Badger Lumber Company:

A lien may sometimes be established for work done away from the premises if it is done upon articles which are intended for use in the building and are actually used in its construction. (2 Jones, Liens, sec. 1324; *Hinchman v. Graham*, 2 S. & R. [Pa.], 170; *Wilson v. Sleeper*, 131 Mass., 177; *Dewing v. Congregational Society of the North Par-*

*ish of Wilbraham*, 13 Gray [Mass.], 414; *Sweet v. James*, 2 R. I., 270; *Singerly v. Doerr*, 62 Pa. St., 9; *Bennett v. Schackford*, 11 Allen [Mass.], 444.)

Lumber furnished for a building with the understanding that it is to be used in the erection of the building may be delivered at a carpenter's shop at a distance from it, and a lien will attach to the premises for the price of it, although it is never actually used in the building. (2 Jones, Liens, sec. 1329; *White v. Miller*, 18 Pa. St., 52; *Singerly v. Doerr*, 62 Pa. St., 9; *Presbyterian Church v. Allison*, 10 Pa. St., 413; *Odd Fellows' Hall v. Masser*, 24 Pa. St., 507; *Hinohman v. Graham*, 2 S. & R. [Pa.], 170; *Harker v. Conrad*, 12 S. & R. [Pa.], 301; *Wallace v. Melchoir*, 2 Browne [Pa.], 104.)

*Abbott, Selleck & Lane* and *M. L. Easterday*, for other appellees.

IRVINE, C.

This was an action brought by the Badger Lumber Company against Willmer Mayes, George D. Mayes, and a number of other defendants for the purpose of foreclosing a mechanic's lien upon a lot in the city of Lincoln. The petition states two causes of action. The first alleges the sale and delivery by plaintiff to the two Mayeses between November 16, 1888, and December 13, 1888, of material for the construction of a building upon the premises. The second cause of action alleges the sale and delivery between August 10 and November 15, 1888, of lumber and building material to one D. R. McGurdy for the construction of the same building; this count alleging that the Mayeses were the owners of the land, and that McGurdy was a contractor with them for the inside finish of the building, for which it was alleged that the lumber was furnished. The New Hampshire Fire Insurance Company, by answer, sets up a mortgage upon the premises,

executed by the Mayeses September 11, 1888, and recorded October 2, 1888; and Henry E. Lewis, by answer, sets up another mortgage dated and recorded upon the same days. One Korsmeyer and one Noll seem also to have set up mechanics' liens upon the premises, although their pleadings do not appear in the transcript. L. B. Treman and F. A. Cropsey seem also to have set up mortgages upon the premises, but their pleadings do not appear in the transcript. The decree established the lien of the plaintiff upon its second cause of action, and the lien of Korsmeyer, as mechanics' liens of equal priority and senior to all others. It establishes the liens of the New Hampshire Fire Insurance Company and Lewis, under their mortgages, as of equal priority, and next junior to the mechanics' liens of plaintiff and Korsmeyer; the lien of the plaintiff upon its first cause of action, and that of Noll, as mechanics' liens of equal priority and next in order; and the liens of Treman and Cropsey as junior to the others; and ordered foreclosure accordingly. The Mayeses appeal, and the New Hampshire Fire Insurance Company also asks that the decree be modified in so far as it establishes a lien on behalf of the plaintiff, superior to that of its mortgage.

It appears by inference from the pleadings, and seems to be conceded in the briefs, that such material as was furnished by the plaintiff to McCurdy, and which forms the basis of the second cause of action alleged by plaintiff, consisted of lumber delivered not at the premises, but at the planing mill of McCurdy, where it is claimed it was worked up into finishing material for the building. Mayes Brothers, in support of their pleadings, urge first, that the claim or lien of plaintiff upon its second cause of action was not filed within time, and this because the evidence fails to show any delivery of material within sixty days of the filing; it being claimed that the single item of the account bringing the furnishing within that time is unsupported by the

evidence. It is next claimed that the law does not provide for any lien for materials furnished at a place other than where the building is constructed, or for the purpose of being worked over into other articles in which the original material is not distinguishable; and, finally, that there was failure of proof as to the amount and value of the lumber bought by McCurdy and actually used by him in the construction of this building. We think only the second of these points is properly presented to us for review. The bill of exceptions is in such a condition that it is exceedingly difficult, if not absolutely impossible, to ascertain just what the evidence was, and give it its due force; and we frankly state that after a conscientious and laborious effort to study the case upon this bill, that effort was abandoned as fruitless. The bill opens with an intelligible and intelligent stipulation as to certain material facts, and thereupon follows a record of certain objections and rulings upon questions and answers appearing in depositions at the end of the record; then follows the testimony of certain witnesses, which, from certain objections made, seems to be testimony in rebuttal. Next comes a group of original instruments offered in evidence, with no intelligible marks of identification. Then follows a great mass of testimony, type written, in all parts trying to the eyes, for the most part appearing to be a "carbon copy," in some parts illegible, and, in one place at least, showing that a portion has been omitted. Under the rule established in *Dawson v. Williams*, 37 Neb., 1, this palpable omission will be in itself sufficient reason for not considering any exceptions based upon the insufficiency of the evidence. But we think, in addition to this, that some consideration is due to the court, and that appellants should at least be required to present to this court a record written in a legible manner and arranged in such a way that the court may ascertain upon whose part the different portions of the evidence were offered, if not the order in which they were received,

and also without the difficulty of solving an enigma determine what evidence was before the trial court, and what excluded. If the appellants fail to do this, this court should presume, in matters not clearly appearing, that there was evidence justifying the trial court in its findings. We shall, therefore, presume, for the reasons just stated, that there was evidence before the trial court justifying its findings upon the controverted issues. It does appear from the pleadings, and is admitted in the briefs, that the material furnished by plaintiff, which forms the basis of its second cause of action, was not delivered where the building was erected, but at the planing mill of McCurdy, and we are by this brought to a consideration of the contention that no lien can be claimed on account of such delivery.

In *Great Western Mfg. Co. v. Hunter*, 15 Neb., 32, the court, speaking through COBB, J., said: "I have no doubt that under the provisions of our statute then in force, lumber or other building material, sold on general book account without regard to any particular building, if used by the purchaser in the erection or reparation of a building upon land of which he is the owner, the vendor of such lumber or other building material may have his lien." And in *Foster v. Dohle*, 17 Neb., 631, it was said by MAXWELL, J.: "This liability of the owner of a building which is being erected or repaired is not placed on the ground of a contract made with the owner by the person performing the labor or furnishing the material; because usually there is no such contract between them, and when there is, the right of the party to a lien is unquestioned; but upon the ground that as the labor or material contributed to the erection or reparation of the building of which the owner receives the benefit, the law imposes upon him the responsibility, for sixty days at least, of seeing that the claims are paid. \* \* \* So far as it may be necessary to carry this purpose into effect, the law should be liberally construed." In *Marrener v. Paxton*, 17 Neb., 634, it is

said: "We have no doubt that in a proper case one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building." In *Irish v. Pheby*, 28 Neb., 231, the court, commenting upon *Foster v. Dohle*, *supra*, say that the doctrine is "that the builder would be liable for such material as was actually put into the building, and might be held liable for material not actually put into the building if those furnishing it to the contractor acted in entire good faith, and the material was delivered to the material-man at the site of the building."

In a number of cases the court has stated that the mechanic's lien law of this state should receive a liberal, and not a strict, construction; and the foregoing authorities, taking the portions cited along with the questions there under consideration, lead to the conclusion that the doctrine of a subcontractor's lien is not based upon any implied agency authorizing the contractor to obligate the owner, but upon an equity raised by the statute from the use of materials in the construction of a building on behalf of the person furnishing such material. In some cases it is not required that the subcontractor should show, at least to make out a *prima facie* case, that the materials were actually used in the construction, delivery upon the premises being deemed *prima facie* evidence, and held to be notice to the owner of the furnishing of the material for that purpose. But in view of the policy of our law upon the subject, we see no reason why one furnishing lumber at a planing mill, to be there worked into shape to put into a building, where it was intended by the vendor and purchaser that it should be so used, and where it has been in fact so used, should not be entitled to a lien as much as if

he had furnished it upon the premises, and had it there worked into proper form, the only difference arising upon the question of notice, which will be hereafter referred to.

We think the law is well stated in 2 Jones, Liens, sec. 1324, as follows: "A lien may sometimes be established for work done away from the premises if it be done upon articles which are intended for use in the building, and are actually used in its construction or repair. In such case the labor is to all intents and purposes performed in the erection, alteration, or repair of a building within the terms of the statute. Where, for instance, the inside finish for a house is sawed, planed, or moulded at a mill, or the doors or windows are made at a carpenter shop, or the iron work is prepared at a blacksmith shop away from the premises, but really as a part of the work of construction, and the material upon which such work is done actually becomes a part of the building, a lien arises for such labor equally with the labor performed upon the land on which the house is erected. But it is essential that such labor be performed under an agreement that the articles upon which the work is done are to be used in the construction of the building against which it is sought to enforce the lien. Thus, if the owner of a planing mill saws lumber for a builder without any agreement for its use in any particular building, though the lumber is in fact used in the construction of a building which the builder was erecting at the time under a contract for another person, the mill-owner is not entitled to a lien on such building." This reasoning applies to subcontractors as well as principal contractors. While the authorities are not in harmony in different states upon many questions arising under mechanic's lien laws, this doctrine seems to receive substantial and reasonable support from the adjudications. Assuming, therefore, that the evidence justified the trial court in finding that the complainant furnished this lumber to McCurdy with the understanding that it should be

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used in the construction of this building, and that it was in fact so used, we think the lien was correctly allowed.

There remains only the question of priorities. It is probable that in such a case, in a contest between a lienor and mortgagee, the time when the material in its manufactured form was delivered upon the premises should be considered the time when the lien attached. So if in this case the evidence showed that the mortgage of the New Hampshire Fire Insurance Company was executed before any delivery of the manufactured material upon the premises, it would appear unjust to give the plaintiff priority of lien, although lumber may have been delivered for the purpose of manufacturing at the planing mill before the mortgage was made. The notice to subsequent lienors is derived from the condition of the premises (*Henry & Coatsworth Co. v. Fisher*, 37 Neb., 207; *Holmes v. Hutchins*, 38 Neb., 601), and it would seem too much to require of a mortgagee that he should not only take notice of what was actually going on upon the premises, but should also investigate as to whether or not materials had been purchased for an improvement and had been delivered elsewhere. But in this case the presumption is that the evidence showed delivery upon the premises before the mortgages were made, and we can find no evidence to the contrary. The judgment of the district court is

AFFIRMED.

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SOPHIA W. DAVIS V. JOHN G. BALLARD ET AL.

FILED JANUARY 4, 1894. No. 5431.

1. A district court obtains jurisdiction of a transitory action and of the person of the defendant when the defendant was within the county when the petition was filed and summons issued,—the defendant leaving the county, however, before serv-

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ice, and service having been obtained upon an alias summons issued after his return to the county.

2. **Alias Summons.** For the purpose of determining the jurisdiction of the court in such a case the issuance of the alias summons is to be treated as a recommencement of the action.
3. *Coffman v. Brandhoeff*, 33 Neb., 279, distinguished.

ERROR from the district court of Lancaster county.  
Tried below before HALL, J.

*Talbot & Bryan*, for plaintiff in error:

All civil actions in Nebraska other than proceedings in attachment are commenced with the issuance of the writ of summons which is served on the defendant. The filing of the petition is not the commencement of the action, and although a petition may remain on file before the time of the issuance of an alias summons, yet in law the action must be considered as commenced at the issuance of the summons which is actually served upon the defendant. (*Cropsey v. Wiggenghorn*, 3 Neb., 116; *Baker v. Sloss*, 13 Neb., 231; *Gage County v. Fulton*, 16 Neb., 5.)

It is immaterial when the petition was filed. If it is said that the petition must be refiled at the time of the issuance of each summons, then the court must conclude that the issuance of an alias summons is in law equivalent to the formal matter of refileing the petition. The jurisdiction of the court over the person is obtained by the service of process. (Wells, Jurisdiction, sec. 83; *Johnson v. Jones*, 2 Neb., 136; *Smelt v. Knapp*, 16 Neb., 54; *Frazier v. Miles*, 10 Neb., 113; *Aultman v. Cole*, 16 Neb., 5.)

*Leese & Stewart, contra*, cited: *Coffman v. Brandhoeff*, 33 Neb., 279; *Carlisle v. Corran*, 2 S. W. Rep. [Tenn.], 26.

IRVINE, C.

On the 10th day of September, 1891, Sophia W. Davis filed her petition in the district court of Lancaster county

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against John G. Ballard, Caleb Strickler, the First State Bank of Bertrand, and James A. Ruby, sheriff, to recover damages for a wrongful attachment of property alleged to belong to plaintiff, but to have been seized upon a writ directed against a third person, it being alleged that Ruby, as sheriff, levied the attachment; that Ballard, as plaintiff, directed the levy, and that the other defendants rendered aid and assistance in the act. Upon the same day a summons was issued, which, upon September 23, was returned *non est inventus*. Upon the 1st day of March, 1892, an alias summons was issued which, upon March 3, was returned as having been served upon Ballard March 2; the other defendants not found. Ballard entered a special appearance and objected to the jurisdiction of the court, first, because none of the defendants was present in Lancaster county at the time of the commencement of the action; second, because the petition was filed September 10, 1891, and permitted to remain on file until March 1, 1892, when the alias summons was issued; third, because the action was not commenced in the county in which any of the defendants reside or could be summoned. These objections were sustained and the action dismissed for want of jurisdiction.

The evidence was in the form of affidavits, which are preserved in the bill of exceptions. The affidavit of John G. Davis is to the effect that Ballard was in Lancaster county on the 10th of September, when the petition was filed and the original summons issued, and that he remained in that county a few days thereafter, but evaded service; also, that upon March 1, 1892, Ballard was in the county before the alias summons was issued and at the time of its issuance. Ballard's affidavit is that upon September 10, 1891, and for several years prior thereto, he was a resident of Phelps county, and has ever since resided in that county; that the other defendants are all residents of Phelps county; "that none of the defendants have ever been in Lancaster

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county since the 10th day of September, 1891, and for a long time prior thereto, except this affiant, who was temporarily present in Lancaster county on March 1, 1892." There was no evidence outside of these two affidavits.

Davis' affidavit is positive in its averment that Ballard was in Lancaster county upon September 10, when the petition was filed and original summons issued. Ballard's affidavit is equivocal and does not deny this. It is true that he says that none of the defendants have been in Lancaster county since the 10th day of September and for a long time prior thereto, but his language seems to be carefully studied so as not to assert that none were in the county upon the 10th day of September, and the words "except this affiant" seem also to be inserted in the place they occupy for the purpose of still further guarding this point. It must, therefore, be taken as established that when the petition was filed and the original summons issued, Ballard was within the county and might there at that time have been summoned. Again, it is admitted that Ballard was in the county on the 1st of March, the day the summons was issued, which was served upon him on the 2d, and it is averred and not denied that he was there on that day at and prior to the time when the alias summons was issued. These facts take the case out of the rule in *Coffman v. Brandhoeffer*, 33 Neb., 279. In that case suit was begun in attachment by the filing of a petition and the issuance of summons, writ of attachment, and garnishment process April 3. Upon April 25 the summons was returned not served. Prior thereto a motion to quash was filed. It appeared that the defendant was not in the county when the summons was issued, but the plaintiff relied upon proof that it was issued upon information that the defendant was then *en route* to Douglas county, and that plaintiff expected and intended that the summons would be served before the return day. It was held that upon these facts the court had no jurisdiction. Section 60 of the Code, providing that such actions "must

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Davis v. Ballard.

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be brought in the county in which the defendant, or some of the defendants, reside or may be summoned," was construed as meaning that the suit, if not instituted in the county where the defendant resides, must be brought in a county where the defendant was at the time the suit was begun, and that the summons must be served upon him while in that county. In other words, it cannot be said that an action is properly begun when a petition is filed and summons issued without the present ability to proceed and serve the summons. To permit a contrary course would allow the plaintiff to select his forum, issue summons after summons, and lie in wait for a chance coming of the defendant. It would open a door to fraud upon the jurisdiction of the court. No such state of affairs exists here and the reasons do not apply. When the petition was filed and the original summons issued, Ballard was in Lancaster county and legally liable to service there. The action was rightfully commenced in Lancaster county, at that time; but aside from that consideration the proceedings of March 1, 1892, amounted to a new commencement of the action at a time when Ballard was in the county, when an action could rightfully be commenced and when as a matter of fact it was proceeded with and service obtained. The mere fact that the petition had remained on file presents no reason for denying the jurisdiction of the court. It is clear that had the same petition been taken and refiled upon March 1, when the alias summons was issued, no question could be raised. The commencement of an action depends not only upon filing a petition, but the issuance of summons. For some purposes it is not deemed commenced until the summons is served, although after service the commencement of a suit may relate back to the date of the summons. In no case is an action, where jurisdiction depends upon actual service, deemed commenced by the mere filing of a petition unaccompanied by the issuance of summons. In order that an action should be com-

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menced there must in every case be a petition on file and a summons issued based upon that petition. Both these essentials existed upon March 1, as soon as the alias summons was issued. The first summons having proved abortive, the issuance of the alias summons for the purposes of this case must be deemed the commencement of the action, and for the reasons stated we think the learned judge erred in sustaining defendant's objections. It must be remembered that the only service had was upon Ballard, the plaintiff in the attachment suit. The acts complained of were tortious in their nature, and Ballard might be sued without joining other tort-feasors. We are not, therefore to be understood as determining any questions which might arise in consequence of any action taken for the purpose of bringing the sheriff into the case by summons issued to another county and there served upon him.

REVERSED AND REMANDED.

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EDWARD ROSEWATER V. FRIEDRIEKA PINZENSCHAM.

FILED JANUARY 16, 1894. No. 6103.

38	835
57	26
57	29
57	744

1. Notice of an application for a license to sell intoxicating liquors must be published at least two weeks in a newspaper published in the county having the largest circulation therein, before any action can be taken on the application. When the notice is inserted in a daily paper, it must be published daily for the statutory period.
2. The affidavit of the publisher of a newspaper, accompanying and annexed to such a notice, stating, after giving the name of the paper, "that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspaper from the 15th day of December, 1892, to the 28th day of December, 1892," is *prima facie* evidence of the publica-

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tion of the notice, and that the same was inserted in the proper newspaper. The affidavit may be impeached by competent evidence.

3. A license board has no authority to designate the newspaper in which the publication of such notices shall be made.
4. The statute relating to the publication of notices of applications for liquor licenses contemplates that the newspaper in which such notices are to be published must be one having *bona fide* subscribers. The circulation of the paper is not to be determined alone from the number of subscribers in the county, but from such subscription list and the *bona fide* average sales of the publication combined.
5. Whether or not several editions of a daily paper are separate and distinct publications is a question of fact to be determined, from the evidence, by the license board.
6. Notice of application for liquor license. Where the matter published in each of several editions of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to a different set of subscribers, liquor notices should be inserted in but one edition thereof, and the circulation of which alone will determine whether the notice was inserted in the proper paper.
7. Powers of License Board. A license board, on the hearing of a remonstrance against granting a liquor license, has power to compel the attendance of witnesses, the production of books and papers, and to commit for contempt a witness if he persists in refusing to answer questions, or if he willfully refuses to produce books and papers before the board.

ERROR from the district court of Douglas county. Tried below before KEYSOR, J.

The opinion contains a statement of the case.

*Edward W. Simeral*, for plaintiff in error:

The law regards each daily edition as a separate newspaper. (*State v. City of South Omaha*, 33 Neb., 876; *Russell v. St. Paul, M. & M. R. Co.*, 31 N. W. Rep. [Minn.], 692; *Scammon v. City of Chicago*, 40 Ill., 146; *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371.)

*Hall & McCulloch, contra, cited: Fairchild v. City of St. Paul*, 49 N. W. Rep. [Minn.], 325; *Lambert v. Stephen*, 29 Neb., 283.

NORVAL, C. J.

This is a proceeding in error to reverse the judgment of the district court of Douglas county affirming an order of the board of fire and police commissioners of the city of Omaha granting a saloon license to defendant in error. In December, 1892, Friedrieka Pinzenscham filed with the secretary of the board of fire and police commissioners of the city of Omaha a petition, signed by the requisite number of qualified petitioners, praying a license to sell intoxicating liquors in said city during the year 1893. Notice of the application in due form was published in all of the daily editions of the Omaha *Daily World-Herald*, from the 15th day of December, 1892, to the 28th day of the same month. Edward Rosewater filed with said board a remonstrance against the issuing of a licence to defendant in error, on two grounds: First, that the notice of said application was not published in the newspaper having the largest circulation in Douglas county; second, that at the time said notice was published in the *World-Herald* the applicant knew said paper did not have the largest circulation in said county. On the 12th day of January, 1893, a hearing was had upon the remonstrance, before the board of fire and police commissioners, and upon consideration of the testimony adduced it was ordered by said board that the remonstrance be overruled, that the applicant's bond be approved, and that a license be granted. The remonstrator prosecuted error to the district court, where the decision of the board was sustained.

Section 2174 of the Consolidated Statutes (sec. 2, ch. 50, Comp. Stats.), relating to notice of applications for liquor licenses, provides that "no action shall be taken upon said

application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in said county, having the largest circulation therein, or if no newspaper is published in said county, by posting written or printed notices of said application in five of the most public places in the town, precinct, village, or city in which the business is to be conducted," etc. The foregoing provision is mandatory and imperative. Unless the statutory notice has been given, the license board has no jurisdiction or power to issue a license. Manifestly it was the intention of the legislature that the notice should be published in the newspaper, in case one is published in the county where the liquors are to be sold, having the largest *bona fide* circulation therein. (*Lambert v. Stevens*, 29 Neb., 283.) In the case cited it was held, in effect, that, even though the notice is published in a newspaper not having the largest circulation, the publication is sufficient, provided the applicant acted in good faith in the making of the choice of the paper; and upon a re-examination of the question, we are satisfied that the rule announced in the decision alluded to is correct, and should be followed.

In *State v. South Omaha*, 33 Neb., 876, it was decided that a notice of an application for a license to sell intoxicating liquors must be published for two weeks, in each issue of the paper. Where the paper containing the notice is a daily, the notice must be published daily; but in case the paper having the largest circulation in the county is published weekly, the notice must be published therein in every issue of such paper for two weeks. In the case at bar, no question is made as to the form of the notice, nor is it claimed that the notice was not inserted for the requisite length of time, but it is insisted by the remonstrator that the newspaper selected was not a proper one, for the reason that the *World-Herald* does not have as large a circulation in Douglas county as the *Omaha Bee*. This is the main

ground, and the only one which we deem necessary to notice, upon which a reversal is asked. It might be observed that the notice given by the defendant in error of her application for a license, with proof of publication thereof, was filed with the license bond before any action was taken upon this application. A copy of this notice is contained in the record before us. Accompanying and annexed to the notice is the affidavit of Guy N. Stephens, the advertising clerk of the Omaha *Daily World-Herald*, which states "that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspapers from the 15th day of December, 1892, to the 28th day of December, 1892." This affidavit is *prima facie* evidence, not only of the publication of the notice, but that the same was inserted in the newspaper having the largest circulation in Douglas county. The affidavit, however, is not conclusive, but may be impeached by competent proof. (Code, sec. 370.)

Does the evidence in the case disclose that the notice in question was not published in compliance with the provisions of the statute above quoted, relating to such notices? Upon the hearing before the board of fire and police commissioners there were introduced in evidence, over the objection of the applicant, the record of a resolution adopted by said board on the 30th day of October, 1892, requesting the publishers of the several newspapers in Douglas county to furnish the board with a sworn statement of the number of subscribers each had in the county, to the various editions, during the period beginning August 1, 1892, and ending October 31, 1892; also the record of the following proceedings of the board at their meeting held on November 14, 1892:

"The secretary presented affidavits of circulation from the Omaha *World-Herald* and from the Omaha *Bee* as follows, to-wit: From William H. Dox, city circulator of the

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Rosewater v. Pinzenscham.

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*World-Herald*, dated November 7, 1892, showing the average daily circulation during the period beginning August 1, 1892 and ending October 1, 1892, to be 10,112 copies. From N. P. Feil, of the *Omaha Bee*, dated November 7, 1892, showing the average daily circulation of the *Bee* for three months ending October 31, 1892, to be, *Morning Bee*, 2,374 copies, and *Evening Bee*, 8,144 copies (total 10,518). From G. M. Hitchcock, of the *World-Herald*, dated November 14, 1892, showing the circulation of the *World-Herald* for the month of October, 1892, as being 10,694. From N. P. Feil, of the *Bee*, dated November 14, 1892, showing the average daily circulation of the *Evening Bee* during October as 8,214 copies, and the *Morning Bee*, 2,522 copies (10,736).

"Thereupon, upon motion, the following resolution was adopted, to-wit:

"*Resolved*, That the board finds from the affidavits filed by the *World-Herald* and from the affidavits filed by the *Bee*, that the *Bee* is the newspaper having the largest circulation in the county of Douglas, the two papers above mentioned being the only two newspapers which have filed any evidence of circulation."

The foregoing action of the board was had prior to the time Pinzenscham filed her petition for a license. We are unable to find any provision of statute, and our attention has not been called to any such by counsel, which makes it the duty of a license board to take testimony and determine in advance of the filing of an application for a license, which paper published in the county has the largest circulation therein. The action of the board, therefore, was not binding upon the applicant, nor was the same admissible for the purpose of showing which paper, the *Omaha Bee* or the *World-Herald*, had the larger circulation. We do not understand that counsel for plaintiff in error claims that the foregoing record of the proceedings of the board was competent evidence on the question of circulation, or that the

same was admitted for that purpose; but rather, since a copy of the record was served upon defendant in error, it was admissible as bearing upon the question whether or not she acted in good faith in the selection of the paper in which the notice was published. In our view, the validity of the notice in this case does not depend upon the good faith, or want thereof, of the defendant in error in the designation of the paper. Therefore, said record of the proceedings of the board of fire and police commissioners will not be further considered.

The determination of the question of fact, namely, which of the two papers had the larger circulation, involves the consideration of the evidence. Upon the hearing of the remonstrance, testimony was introduced for the purpose of establishing that the notice was not published in the newspaper contemplated by the statute.

W. H. Dox, being called as a witness for the remonstrator, testified that he was an employe of the publisher of the *World-Herald*; that the average daily circulation of the *World-Herald* in Douglas county, for the months of August and September, 1892, was 10,112; that during the month of October of that year it was between ten and eleven thousand; that during a portion of the months named there were three editions of the paper, viz., morning, noon, and evening, and for the remainder of the time there were but two; that the figures given by the witness covered all the editions, including the paper issued on Sunday.

G. M. Hitchcock, business manager of the *World-Herald*, testified that generally four editions of his paper are published daily, namely, "*Early Mail*" edition, so called for the Burlington flyer, *Morning World-Herald*, *Noon World-Herald*, and *Evening World-Herald*; that subscribers of the morning and evening editions are rarely the same, probably twenty-five duplicates; that the noon edition is not sent to subscribers, but is sold by news-boys. Witness

declined to state the number of subscribers for the different editions separately, or the number sold by news-dealers, but insisted on treating all the editions as one newspaper. Witness was asked to produce the book containing a list of subscribers, but he failed to comply with the request.

N. P. Feil, business manager of the Omaha *Bee*, testified that during the months of August, September, October, November, and December, 1892, there were three editions daily, except Sunday, known as *Morning World-Herald*, *Noon World-Herald*, and *Evening World-Herald*; that the average daily circulation of the Omaha *Evening Bee*, for August, September, and October, 1892, six days in the week, excepting Sunday, on which no evening edition is published, was 8,144, which is exclusive of returned papers from news-stands, or railroad papers delivered in Omaha; that the average circulation of the *Evening Bee* for December of the same year was 8,151, and for November, 8,308. Witness further stated that in giving these figures he relied upon a memorandum made from the books of the *Bee*, and that he could not remember the circulation without refreshing his recollection from the books or a memorandum. The board also ruled that witness should not state the circulation of the *Morning Bee*.

F. M. Youngs, foreman of the press-room of the Omaha *Bee*, testified that the number of *Evening Bees* printed daily during December, 1892, was between ten and eleven thousand, of which number about seventy-six or seventy-eight hundred were delivered daily to Mr. Williams, the lessee of the city circulation of the paper; that from 250 to 350 *Evening Bees* are delivered by witness daily to the news-boys; that the usual speed of a Potter press is 9,000 per hour; that the publishers of the *World-Herald* have a Potter press, and also a Hoe press.

William Nichol, helper in the press-room of the *Bee*, testified that he was familiar with the speed newspapers are printed on a Potter or web perfecting press, the same

being the kind used in the printing of the *Evening World-Herald*; that such a press will ordinarily print 150 papers per minute; that on December 22d, 23d, 24th, and 31st, 1892, and on January 2, 1893, witness timed the running of the press on these dates, during the period the *Evening World-Herald* was being printed, and that the length of time consumed was from forty-seven to fifty minutes, exclusive of stops.

James Ryan testified that it requires about an hour to print the evening edition of the *World-Herald*.

Edward Rosewater, president of the Bee Publishing Company, testified that he had examined the books and found that the circulation of the *Bee* was larger in November than in October; that the circulation of the *Evening Bee* was greater by one hundred in December than it was in October. Witness declined to give the circulation of the *Morning Bee*, but stated that "whenever Mr. Hitchcock will come and tell how many papers they print in the morning, I will tell ours."

There is considerable more testimony in the record, but the foregoing is believed to be a fair synopsis of that portion relating to the circulation of the two papers. It will be noticed that the evidence in the case is not of the most conclusive or satisfactory character. Instead of the books, which show the circulation of the *Bee* and *World-Herald* respectively, being produced on the trial and introduced in evidence, witnesses were permitted to state what it is claimed appears on the face of the books. On the one side the witnesses refused to divulge the circulation of each edition of the *World-Herald*, while those for the remonstrator declined to give the circulation of the *Morning Bee*. The books themselves were the best evidence of their contents, yet they were not required to be produced, nor was any attempt made to compel the witnesses on either side to answer many pertinent and proper questions put to them. Doubtless, this arose from the belief that the license board

had no authority either to enforce the production of the books, or to punish witnesses as for contempt for their refusal to testify. This court is, however, unanimously of the opinion that the board possessed such power. The proposition is too plain to require discussion or the citation of authorities in support thereof.

It appears from the proofs in the case that defendant in error's notice was inserted in all of the editions of the *World-Herald*, and that the aggregate daily circulation in Douglas county of all of said editions at the time was between 10,000 and 11,000. The *Evening Bee* likewise had at the time of the publication a circulation in the county of 8,150. The contention of the remonstrator is, and we are asked to so decide, that each edition of the *World-Herald* is a separate and distinct newspaper. A newspaper, in the usual popular acceptation of the word, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day. (16 Am. & Eng. Ency. of Law, 490.) In contemplation of the statute relating to the publication of notices of applications for liquor licenses, the newspaper in which such notices are to be published must not only be one having *bona fide* subscribers, but the publication must have the largest circulation in the county. By this we do not mean that the circulation is to be determined alone by the number of subscribers residing in the county, but from the subscription list and average *bona fide* sales of the paper in the county, combined. A paper which is not distributed to subscribers, but is merely sold to news-boys and news-dealers for distribution, is not such a publication as the law requires notices like the one in question shall be inserted in. (*Scammon v. City of Chicago*, 40 Ill., 146.)

Counsel for plaintiff in error cites the case of *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371, as sustaining his contention that the several daily editions of the *World-Herald* do not constitute one newspaper. In that case, no-

tice of proceedings to condemn real estate taken for right of way of a railroad was published in the *Daily State Journal* a portion of the time, and the remainder of the time in the *Weekly State Journal*. It was held that the publication was invalid, for the reason that it was made in two distinct newspapers, instead of one; in other words, that the *Weekly State Journal* was a separate and distinct paper from the *Daily State Journal*. There the evidence conclusively established, and the trial court so found, that although such papers were published at the same office, by the same proprietors, they were sent to different subscribers in different localities, and were in fact separate and different papers. There is nothing in the record before us from which we can say as a matter of fact that each daily edition of the *World-Herald* is a separate and distinct publication.

It is said in the brief of remonstrator "that the *Morning World-Herald* and *Evening World-Herald* contain different articles and news items." This may be true as a matter of fact, but there is absolutely no proof in the record to show whether the matter contained in the various editions is the same or unlike. If there is such evidence, we have failed to discover it. True, each edition was issued by the same publisher and each was sent to a different set of subscribers, from which we might conjecture, perhaps, that the several editions did not constitute one newspaper; yet these facts alone are not sufficient to justify us in so holding. Whether or not the several editions of a daily paper are separate and distinct publications is a question of fact to be determined from the proof, in the first instance, by the license board. If the matter published in each edition of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to different subscribers, it would be quite clear that the combined circulation of all cannot be counted, for the purpose of ascertaining the newspaper in which notices like the one in question should be published.

Counsel for defendant in error calls attention to the case of *State v. South Omaha, supra*, and to the following language used by the author of that opinion, viz.: "This notice is to have as wide publicity as possible." Again, "The object of the publication is to give the widest possible publicity to the application, in order that those who consider the applicant an unfit person to conduct a saloon, may have an opportunity to remonstrate against the issuing of license." The foregoing must be construed with reference to the case that was there before the court. The question there involved was whether a notice of application for a license to sell liquors, which is published in a daily paper, must be published therein continuously each day for two weeks. The question now under consideration was not before the court. To give the language above quoted the meaning contended for by defendant in error would not only require that the publication be made in each edition of a newspaper, daily, weekly, and tri-weekly, as well as in all the newspapers published in the county. Such was not within the contemplation of the statute. All that the law requires is that the notice shall be published in the newspaper having the largest circulation in the county. If several editions of a daily paper in fact constitute but one paper, then the notice must be published in each of said editions. If each edition is a separate and distinct publication, a publication in one, if the same has the largest circulation in the county, will be sufficient. But if we regard each edition of the daily *World-Herald* as a distinct publication, still the judgment below is right, since the evidence fails to disclose that any one of such editions, in which the notice was published, had a smaller circulation than the *Evening Bee*. The latter publication may have a larger circulation in Douglas county than any single edition of the *World-Herald*, but if so, the evidence does not show it, owing to the fact that the record shows the aggregate circulation of the several editions of the paper merely, and not the circulation of

Omaha &amp; R. V. R. Co. v. Rickards.

each edition separately. For the reasons stated the judgment will be

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY  
v. JOHN N. RICKARDS.

FILED JANUARY 16, 1894. No. 5187.

38	847
48	512
88	847
59	345
88	847
00	97

1. **Adverse Possession.** AN EASEMENT in real estate may be acquired by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of ten years.
2. ———. Where a party enters upon and occupies land under color of title, such possession is regarded as co-extensive with the entire tract described in the instrument under which such possession is claimed.
3. **Easements: ADVERSE POSSESSION.** Although color of title is not indispensable to adverse possession, yet where a railroad company enters upon and takes possession of the real estate of another for a right of way without color of title, such possession is limited to the land actually occupied; and in such case the corporation will acquire a right of way of the width, and no more, which it has so used and occupied for the full period of limitations.
4. **Eminent Domain: PLEADING: DESCRIPTION.** In proceedings to condemn land of an individual for the use of a railroad, the petition must accurately describe the tract affected by the proceedings. Where the petition describes the land by government subdivision, the description is insufficient to authorize the condemnation of real estate within the limits of an incorporated city, which real estate has been laid out and platted into lots and blocks.

ERROR from the district court of Gage county. Tried below before APPELGET, J.

*J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.*

*Rickards & Prout, contra.*

NORVAL, C. J.

This is an action of ejectment by John N. Rickards against the Omaha & Republican Valley Railway Company to recover possession of a portion of lot 103, in South Beatrice, an addition to the city of Beatrice. The petition is in the ordinary form. The defendant answered by a general denial, and also pleaded the statute of limitations of ten years. Plaintiff replied, denying each allegation of new matter contained in the answer. There was a trial to the court, without the intervention of a jury, which resulted in a finding and judgment for the defendant company that it has an easement in, and is entitled to the possession of, that part of said lot 103 embraced in the following description, to-wit: Commencing at the northeast corner of said lot 103, running thence south 27 feet; thence northwesterly to a point 56 feet west of the northeast corner of said lot; thence east 56 feet to the place of beginning. The court further found for the plaintiff for so much of said lot 103 as is described as follows: Beginning at a point 56 feet west of the northeast corner of said lot, running thence west 43 feet; thence southeasterly to a point in the south line of said lot, 37 feet west of the southeast corner of said lot; thence east 37 feet; thence north 17 feet; thence northeasterly to the point of beginning. The defendant prosecutes error, alleging that the finding in favor of the plaintiff is not sustained by sufficient evidence, and is contrary to law. The cause was tried upon the following agreed statement of facts:

“First—The property in controversy is situated within the limits of the east half northeast quarter of section 4, town 3, range 6 east of the sixth P. M.

“Second—The legal title to said tract, and the disposition thereof is shown, so far as the same appears thereon, by the abstract of the title thereto, hereto annexed, marked Exhibit ‘A’ and made a part hereof; other proceedings

and conveyances claimed to affect said property are as below stated.

“Third—The abstract annexed, and its memoranda of conveyances, and also the statements and memoranda of other proceedings below written, are to be taken with the same effect as though the original instruments and proceedings were themselves hereto annexed.

“Fourth—The track of the defendant and its road-bed in fact occupied, when constructed, and still occupies, the following described ground, viz.: Commencing at the northeast corner of lot No. 103 in South Beatrice, running thence south 27 feet; thence in a northeasterly direction to a point 56 feet west of the northeast corner of said lot; thence east 66 feet to the place of beginning.

“Fifth—The Omaha and Republican Valley Railroad Company was, about the month of September, 1879, a railroad corporation of this state, and at said time located its line of railroad over and across the east half northeast quarter section 4, town 3 north, range 6 east, and by its line across said land in fact intersected and crossed lots 104, 103, 102, 110, 111, 112, 113, 114, 99, 100, 101, in South Beatrice, as shown by the plat thereof, referred to in the abstract of title hereto annexed, marked Exhibit ‘A.’

“Sixth—That the Omaha & Republican Valley Railroad Company finished and completed its line of railroad, as in this agreement mentioned, on or about January 1, 1880, and has from thence hitherto, it and its successors, maintained, occupied and operated the same on the line of its original location.

“Seventh—That about the month of September, 1879, the Omaha & Republican Valley Railroad Company commenced and instituted certain proceedings in the county court of Gage county, Nebraska, to obtain a right of way for its railroad, and for such purpose duly filed its petition in said court, and that said court duly appointed a commission for such purpose as provided by law; that on or

NORVAL, C. J.

This is an action of ejectment by John N. Rickards against the Omaha & Republican Valley Railway Company to recover possession of a portion of lot 103, in South Beatrice, an addition to the city of Beatrice. The petition is in the ordinary form. The defendant answered by a general denial, and also pleaded the statute of limitations of ten years. Plaintiff replied, denying each allegation of new matter contained in the answer. There was a trial to the court, without the intervention of a jury, which resulted in a finding and judgment for the defendant company that it has an easement in, and is entitled to the possession of, that part of said lot 103 embraced in the following description, to-wit: Commencing at the northeast corner of said lot 103, running thence south 27 feet; thence northwesterly to a point 56 feet west of the northeast corner of said lot; thence east 56 feet to the place of beginning. The court further found for the plaintiff for so much of said lot 103 as is described as follows: Beginning at a point 56 feet west of the northeast corner of said lot, running thence west 43 feet; thence southeasterly to a point in the south line of said lot, 37 feet west of the southeast corner of said lot; thence east 37 feet; thence north 17 feet; thence northeasterly to the point of beginning. The defendant prosecutes error, alleging that the finding in favor of the plaintiff is not sustained by sufficient evidence, and is contrary to law. The cause was tried upon the following agreed statement of facts:

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and conveyances claimed to affect said property are as below stated.

“Third—The abstract annexed, and its memoranda of conveyances, and also the statements and memoranda of other proceedings below written, are to be taken with the same effect as though the original instruments and proceedings were themselves hereto annexed.

“Fourth—The track of the defendant and its road-bed in fact occupied, when constructed, and still occupies, the following described ground, viz.: Commencing at the northeast corner of lot No. 103 in South Beatrice, running thence south 27 feet; thence in a northeasterly direction to a point 56 feet west of the northeast corner of said lot; thence east 66 feet to the place of beginning.

“Fifth—The Omaha and Republican Valley Railroad Company was, about the month of September, 1879, a railroad corporation of this state, and at said time located its line of railroad over and across the east half northeast quarter section 4, town 3 north, range 6 east, and by its line across said land in fact intersected and crossed lots 104, 103, 102, 110, 111, 112, 113, 114, 99, 100, 101, in South Beatrice, as shown by the plat thereof, referred to in the abstract of title hereto annexed, marked Exhibit ‘A.’

“Sixth—That the Omaha & Republican Valley Railroad Company finished and completed its line of railroad, as in this agreement mentioned, on or about January 1, 1880, and has from thence hitherto, it and its successors, maintained, occupied and operated the same on the line of its original location.

“Seventh—That about the month of September, 1879, the Omaha & Republican Valley Railroad Company commenced and instituted certain proceedings in the county court of Gage county, Nebraska, to obtain a right of way for its railroad, and for such purpose duly filed its petition in said court, and that said court duly appointed a commission for such purpose as provided by law; that on or

about November 13, 1879, proof of service of notice on the South Platte Land Company in said proceeding was filed in said court, a copy of which is hereto annexed, marked Exhibit 'B'; that afterwards on the 14th day of November, 1879, said commission filed in said proceedings a report of its doings in the premises, a copy of which is hereto annexed, marked Exhibit 'C'; that on November 18, 1879, the said Omaha & Republican Valley Railroad Company deposited in said county court the amount of money awarded by said commission in said proceeding as stated and awarded in and by said Exhibit 'C'; that afterwards, on December 29, 1879, there was filed in said county court, by said South Platte Land Company, a certain order for the payment of money, a copy of which, with its indorsements, is hereto annexed, marked Exhibit 'D,' and made a part hereof; that on January 9, 1880, the said county court paid out said money on said order and took a receipt therefor in writing, a copy of which is hereto annexed, marked Exhibit 'E,' and the same is made a part hereof. The said commissioners so appointed by said county court were, before the making of the said appraisement and report set forth in said Exhibit 'C,' qualified by taking the oath prescribed by law, a copy of which is hereto annexed, marked Exhibit 'C C,' and the same is made a part hereof. The said report and condemnation proceedings above referred to were all of them recorded in the office of the county clerk of Gage county, Nebraska, on the 7th day of January, 1880, at 2 o'clock P. M. of said day, and entered in the numerical index and recorded in book 'D' of Miscellaneous Records, page 125, and following.

"Eighth—That on the 26th day of December, 1879, the said South Platte Land Company made, executed, and delivered to the said Omaha & Republican Valley Railroad Company its certain deed, a copy of which is hereto annexed, marked Exhibit 'F,' and the same is made a part hereof.

“Ninth—The map or plat hereto annexed, marked Exhibit ‘G,’ made a part hereof, shows the location of the east half northeast quarter and of South Beatrice as laid out thereon, and the line of the original location and construction of said railroad over and through the same, the track shown thereon crossing near the northeast corner of lot 103 being the line of original location.

“Tenth—The heavy white line on said map shows the line which defendant and its predecessor claims and has claimed as its exterior boundary lines under said condemnation proceedings and the said deed to the Omaha & Republican Valley Railroad Company, the particular premises within lot 103 so claimed by it being described as follows: Commencing at the northeast corner of lot 103, running thence west on north line of said lot 99 feet; thence southeasterly to a point in the south line of said lot, 37 feet west of the southeast corner thereof; thence east 37 feet; thence north 44 feet to the place of beginning.

“Eleventh—The Omaha & Republican Valley Railway Company is a railroad corporation of the state of Nebraska, and is the successor to the Omaha & Republican Valley Railroad Company, and as such successor is vested with all the property, rights, and franchises of the said Omaha & Republican Valley Railroad Company.

“Twelfth—The said Omaha & Republican Valley Railroad Company and its successor, this defendant, have been in the open, notorious, exclusive, and adverse actual possession of its said track and road-bed as a railroad, as constructed on its said line of original location, for more than ten years before the commencement of this suit.

“Thirteenth—The premises in the vicinity of the said railroad in the years 1879 and 1880, when said railroad was built over and across the said east half northeast quarter, were vacant and uninclosed lands or lots. The plat of South Beatrice had before that time been made and recorded, but the ground was vacant, uninclosed, and unoccupied.

“ Fourteenth—It is agreed that on August 24, 1877, the following streets and parts of streets, as shown on Exhibit ‘G,’ were duly vacated, to-wit: Fifth, Sixth, Seventh, and Eighth, from the south line of South Beatrice to the south line of Perkins street, Ames street west of the center of Fourth street, also Fourth street, all except the east half of said street, lying north of the south line of Perkins street; and afterwards, on April 26, 1879, a strip extending from the south line of Perkins street southwards was dedicated to the public, which strip was located on what was once the east half of Fifth street, before its vacation.”

The abstract of title, which is attached to the foregoing stipulation as an exhibit, shows a complete and perfect chain of title to the entire premises in controversy, by patent from the United States government to one John L. Carson, and from Carson, through other parties, to plaintiff. The railroad company claims title to the real estate mentioned in the petition by reason of adverse possession. The portion of said lot 103 described in the fourth paragraph of the stipulation is occupied by the road-bed and track of plaintiff in error, and it having been in the open, notorious, exclusive, adverse, actual possession thereof for more than ten years prior to the bringing of this suit, the corporation thereby acquired an easement therein, and was entitled to said strip of ground. The trial court having given the defendant below judgment for that portion of the lot, it is no longer involved in the case.

The controlling, and we may say the only, question presented for our consideration and decision is this: Did the railroad company acquire title to any portion of said lot which the trial court found belonged to Rickards, and which adjoins on the south the strip actually used and occupied by the road-bed and track of the corporation? As we have said, plaintiff in error claims the land in dispute by adverse possession. While the railroad company has been in the exclusive occupancy, for the statutory period, of the

strip used for the road-bed and track, there is nothing in the agreed statement of facts to show that it has been in possession of, or exercised any acts of ownership over, any other portion of said lot 103. The premises, when the road was constructed, were vacant, uninclosed, and unoccupied. There is no claim that the Omaha & Republican Valley Railroad Company, or its successor, plaintiff in error, has ever inclosed the land in dispute with a fence, or that when the road was located, or at any other time, it staked out the width of its right of way across lot 103. So far as this record discloses, the company has never used any portion of the lot for its right of way, except the strip which was awarded it by the district court. The presumption of law is always in favor of the owner of the record title, and the burden of proving adverse possession rests upon the party relying thereon. It did not devolve upon plaintiff below to establish that he and his grantors have been in the actual occupancy of the premises during the statutory period.

Counsel for the railroad company call attention to the tenth paragraph of the stipulation of the parties above mentioned, which reads: "The heavy white line on said map shows the line which defendant and its predecessor claims and has claimed as its exterior boundary lines," etc. There can be no doubt that it is established that the company has ever claimed its right of way, where the road crosses lot 103, consisted of a strip of land 100 feet in width, being 50 feet on each side of the center line of its road-bed, and the land here demanded is within such limits; but it does not necessarily follow that the plaintiff in error, or its predecessor, has held adverse possession of the ground next south of the twenty-seven feet which has been occupied by its track and road-bed. Whether the adverse possession of the twenty-seven feet constituted a similar possession of the whole fifty feet south of the center of its track depends upon whether its occupancy has been under color of title.

There is a marked distinction between a possession acquired under a claim of right or color of title, and where possession of land is taken and held by a mere usurper or intruder. Where a party's occupancy is under a color of title, his possession is regarded as being co-extensive with the entire tract described in the instrument under which possession is claimed. On the other hand, where one enters without color of title, his possession is confined to the land actually occupied. It is firmly settled in this state that while color of title is not indispensable to adverse possession, yet, when the occupancy is without color of title, possession is limited to the land actually occupied. (*Gatling v. Lane*, 17 Neb., 80; *Haywood v. Thomas*, 17 Neb., 237.) The rule stated applies to corporations and individuals alike.

Did the railroad company take possession of any part of lot 103, and hold and occupy the same under and by virtue of a color of title? Neither the condemnation proceedings mentioned in the seventh paragraph of the stipulation, nor the deed referred to in the eighth paragraph, conferred any authority upon the company to take possession of, and construct its road over, lot 103, as we shall proceed to show. In the condemnation proceedings, no reference is made to lot 103, in South Beatrice, or any other lot. The real estate in the notice of condemnation of right of way, and in the report of the commissioners appointed by the county judge of Gage county to appraise and assess the damages caused by the location of the railroad, is described as the east half of the northeast quarter of section 4, township 3 north, range 6 east. It appears from the abstract of title that the northeast quarter of the northeast quarter of said section 4, in June, 1872, was platted by the owner thereof as South Beatrice, which plat was duly recorded on the 12th day of the same month. The condemnation proceedings were not commenced until more than seven years thereafter, and, at the time they were instituted and the railroad was located and constructed, the real estate in controversy

was within the limits of an addition to the city of Beatrice. The description of the property in the condemnation papers was insufficient to include lands which had theretofore been laid out and platted into lots and streets; therefore, by the proceedings to condemn, the railroad company acquired no right of way over lots in South Beatrice. And this is the construction placed upon the condemnation proceedings by the railroad company, for on the 26th day of December, 1879, in consideration of \$750, it procured a deed from the South Platte Land Company, the owner of the lots in South Beatrice, for right of way, a strip fifty feet wide on each side of the center of its railroad track as then located through lots 99, 100, 101, 102, 110, 111, 112, 113, and 114, in South Beatrice. If the railroad company acquired a right to pass over the foregoing mentioned lots under the law of eminent domain, there was no necessity of its afterwards obtaining the deed alluded to. This deed was insufficient to create a color of title to the premises in litigation, for the obvious reason that lot 103, of which they form a part, is not mentioned in the conveyance. For some cause or other, not disclosed by the record, this lot was not included in the description therein. From the fact that in the notice of condemnation, as well as in the report of the commissioners appointed to assess the damages, the land sought to be acquired for right of way is described as being "a strip of ground 100 feet in width upon the line as located," it cannot be inferred that the railroad company claimed or occupied a strip that wide where its track passes over lot 103. A right of way of a railroad is generally 100 feet wide, and probably, where real estate is sought to be appropriated for that purpose by the power of eminent domain, and the width required for right of way is not specified in the proceedings, or where a deed conveys to a railroad company a right of way over a particular tract of land, and no mention is made in the conveyance of the width of the land conveyed, it might be held that the customary or

usual right of way was acquired. Some of the authorities cited by plaintiff in error go to that extent; but it requires no argument to show that such decisions have no application here, since the railroad company entered upon and constructed its road across the lot in question without authority so to do from the owner, and without complying with the statute which confers upon a railroad company the power to appropriate lands for right of way against the consent of the owner. Where a railroad company enters upon land without any pretense of title, in the absence of a designation of boundaries, there is no presumption that the corporation has appropriated for its right of way a strip of the usual width, or all that the statute allows it to take for that purpose.

Attention has been called to the statute of this state relating to eminent domain. We cannot conceive that it has any bearing upon the subject under discussion. As we have already shown, the railroad company acquired no right to cross lot 103 by the condemnation proceedings. Again, the statute does not fix the exact width of a railroad right of way, but, on the other hand, it expressly provides that "the lands held, taken, and appropriated, otherwise than by the consent of the owner, shall not exceed 200 feet in width, except for wood and water stations and depot grounds, unless where greater width is necessary for excavations, embankments, or depositing waste earth." The legislature has specified the maximum width, merely, where land is appropriated for a right of way against the consent of the owner, and this court has held that the right is restricted to so much real estate as is essential for the location, construction, and convenient use of the road. (*Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb., 465.) It must be presumed, in the absence of a showing to the contrary, that the portion of lot 103, which has been actually used and occupied by the railroad company for the past ten years, was all that was reasonably necessary to the convenient and proper use and maintenance of the railway.

The principal authority on which counsel for plaintiff in error rely is *Hargis v. Kansas City, C. & S. R. Co.*, 100 Mo., 210. That was a case where a land owner verbally agreed to donate and convey to the railroad company the usual right of way across his land, and in pursuance thereof the company entered upon the land and staked off a right of way of the customary width of 100 feet, and constructed its road thereon, but exercised actual and exclusive possession of only 25 feet along the center of the strip, under a claim and color of title to the whole 100 feet. It was held that such possession for the necessary length of time gave the company a title, under the statute of limitations, for the strip of 100 feet in width. We find no fault with that decision, but it is clearly inapplicable to the facts of the case at bar. There the corporation entered upon and occupied the land under a license given by the owner, and the boundary of the right of way was marked by stakes. The parol agreement to convey was sufficient to constitute a good color of title (*Niles v. Davis*, 60 Miss., 750; *McClellan v. Kellogg*, 17 Ill., 498; *Teabout v. Daniels*, 38 Ia., 158; *Rannels v. Rannels*, 52 Mo., 108); and the actual possession of a portion of the strip under a claim and color of title to the whole was constructive possession of the entire 100 feet. In the case we are considering, there was no designation of the boundaries of the 100 feet now claimed as a right of way, nor did the railroad company enter under a license, parol or otherwise, from the owner of the lot. It took possession without a shadow or claim of right, therefore such possession is limited to that portion of the lot actually occupied by the company. It is not deemed necessary to refer to the other cases cited in the brief of counsel for plaintiff in error. We are of the opinion that, for the reasons already stated, the judgment of the district court is right, and it is

AFFIRMED.

## HARTWIG CARSTENS v. W. G. McDONALD.

FILED JANUARY 16, 1894. No. 5474.

38	858
48	413
43	871
38	858
45	821
38	858
48	596
38	858
49	752
55	138
55	328
38	858
50	206
38	858
60	67
60	201

1. **Breach of Contract: CHECK AS EVIDENCE.** Defendant contracted to sell and deliver to plaintiff in a reasonable time a quantity of corn, \$50 of the purchase price being paid at the time by the check of the purchaser. A memorandum of the transaction between the parties, stating the number of bushels and price per bushel, was made by plaintiff at the time, on the face of the check, in the presence of the defendant. In an action against the seller for a breach of the contract, it was held that the check was competent evidence.
2. **Action for Damages for Breach of Contract: WHEN ACCRUES.** A mere declaration by a party to a contract, before performance is due, that he does not intend to comply with the terms of his agreement, will not constitute a breach so as to authorize the other party to maintain an action for damages before the time fixed for performance has elapsed.
3. **Instructions: HARMLESS ERROR: REVIEW.** The giving of an erroneous instruction, where it does not have the tendency to confuse and mislead the jury, is not sufficient cause for reversing the judgment.
4. ———: ———: ———. Where a jury has been fully instructed on a given point, it is wholly unnecessary to give another instruction covering the subject, and to do so may be sufficient cause for reversal; but it will not have that effect where it is clear that the jury were not thereby misled.

ERROR from the district court of Pierce county. Tried below before POWERS, J.

*J. B. Smith*, for plaintiff in error.

*Douglas Cones*, contra.

NORVAL, C. J.

This action was brought in the court below by W. G. McDonald against Hartwig Carstens, to recover damages for an alleged breach of an executory contract for the sale

of corn. There was a verdict and judgment in plaintiff's favor for \$6.25, and defendant prosecutes error to this court.

Defendant in error is in the stock business in Pierce county, and plaintiff in error is engaged in farming in said county. The proof shows that on the 7th day of November, 1890, McDonald went to Carstens' farm for the purpose of buying the latter's crop of corn, and, after some negotiations between the parties upon the subject, Carstens finally agreed to sell, and deliver in a reasonable time a quantity of corn at the agreed price of thirty-five cents per bushel. Fifty dollars of the purchase price was paid at the time by McDonald giving his check on the bank for that sum, and the purchaser agreed to pay the balance upon the delivery of the corn. One hundred and forty-one bushels and a half of corn, and no more, were delivered upon the contract early in December, 1890. Carstens informed defendant he would deliver enough more to make 600 bushels, to which McDonald replied that he would not receive the same, unless he would deliver 1,000 bushels. The dispute on the trial was as to the quantity of corn sold. Plaintiff below claims that he purchased 1,000 bushels, while Carstens insists that no definite number of bushels was mentioned at the time the contract was made, but that the agreement covered merely his yellow corn,—that which had been gathered and piled on the ground, as well as the portion then in the field ungathered. The total amount of the yellow corn was afterwards ascertained to be about 600 bushels.

The first assignment in the petition in error is based upon the admission in evidence of the check above mentioned, of which the following is a copy :

“PIERCE, NEB., Nov. 7, 1890. No. —.

“The Farmers & Merchants State Bank, pay to Hartwig Carstens, or order, (\$50) fifty dollars.

“35c. per bushel for 1,000 bus. corn.

“W. G. McDONALD.”

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Carstens v. McDonald.

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The ground of objection to the introduction of the instrument, as stated in the record, is "that it is admitted by the defendant, Mr. Carstens, that he received the \$50 as part payment, and that is all this check can be used for." Had this check been offered for the purpose of proving payment, the error in the introduction thereof, if any, would have been without prejudice, since the payment of the \$50 is admitted by the defendant's answer; but the writing was not put in evidence for such purpose, but to corroborate the testimony of the plaintiff below as to the quantity of corn purchased. It will be noticed that on the face of the check appear the words "35c. per bushel for 1,000 bus. corn." They were made by the drawer of the check. True, there is a dispute in the testimony as to the precise time they were written, but according to the testimony of plaintiff in error, which is not contradicted by any other witness, they were, at least, on the instrument when plaintiff received the money thereon from the bank, and he knew they were there at that time. According to the testimony of defendant in error, they were written by himself in the presence of Mr. Carstens at the time the contract was entered into, and prior to the delivery of the check, as a memorandum of the agreement. We think it competent evidence of the transaction as against plaintiff in error.

Another ground urged for a reversal is that the verdict is not sustained by sufficient evidence. There is a sharp conflict in the testimony relating to the number of bushels of corn sold. As to the other matter there is little dispute. We do not think the weight of the evidence is so clear and decided against the contention of the plaintiff below as to call for a reversal of the judgment. If the agreement was that Carstens should deliver 1,000 bushels of corn, as there is abundant evidence in the record to show, and which the jury found to be true, then the contract was broken by plaintiff in error.

Carstens v. McDonald.

The court charged the jury, in the seventh paragraph of the instructions given on its own motion, that "a breach of a contract occurs when one of the parties to it refuses and declines to carry out its terms, and the other party to such contract may then treat it as broken; and in this case, if the defendant, after making the contract, and before the time of furnishing all of the corn expired, refused to deliver more, or placed himself in a condition that he could not perform the contract, the plaintiff was then justified in treating the contract as broken by the defendant, and proceeding to enforce a recovery of its breach." As a legal proposition, the foregoing is inaccurate. A mere declaration by a party to a contract that he does not intend to carry out the terms thereof before performance is due, will not constitute a breach, so as to authorize the other to at once maintain an action; for the party, at any time before the period fixed for performance, has the right to recant and comply with his agreement; but if he fails to withdraw his declaration before the time comes for performance, it will excuse the default of the other party. (*Daniels v. Newton*, 114 Mass., 530.) Plaintiff in error could not have been prejudiced by the giving of the instruction complained of, inasmuch as the suit was not instituted until after the time for performance had elapsed, and there is no claim that plaintiff in error ever offered to comply with the agreement set up in the petition. On the contrary, the defendant below, both in his answer and in his evidence, denies the making of said contract, and he contested the cause in the court below through the entire trial, upon that theory. The jury therefore could not have been misled by the charge. The giving of an erroneous instruction, when it does not have the tendency to confuse and mislead the jury, is not sufficient reason for vacating the judgment and granting a new trial.

Exception is taken to instruction No. 10, which reads as follows: "If you find for the plaintiff, you will then de-

*split infinitive*

*Why not combine the two since they are so justifiably associated?*

*You're a fine guy to talk of combining! Where's your interrogation mark?*

termine the damage he has sustained, which will be the difference between the agreed price of corn and its market price at the time it should have been delivered under the contract for the number of bushels offered, viz., 600, and render your verdict accordingly." The objection urged against the instruction is that, as the substance of it had already been given in the fifth paragraph of the charge, undue prominence was thereby called to the subject. It is useless to give an instruction where the substance of it has once been given, and to do so may be sufficient ground for reversal; but it will not have that effect where it appears that the jury were not thereby misled or confused. (*Seabrock v. Fedawa*, 30 Neb., 424.) In the case at bar plaintiff in error has no just cause to complain of the amount of damages. In no view of the testimony would the jury have been warranted in returning a verdict for the plaintiff below for a smaller sum.

The defendant requested the court to charge the jury not to take into consideration the memorandum on the check, which request was refused. What has been said by us on the introduction of the check disposes of the request to charge. There is no reversible error in the record, and the judgment is

AFFIRMED.

38	862
146	448

38	862
50	159
52	378
52	435
54	184

38	862
56	693

### JAMES P. PALIN V. STATE OF NEBRASKA.

FILED JANUARY 16, 1894. No. 5995.

1. **Rape: EVIDENCE.** On a trial of an information for an assault with intent to commit a rape, it is not necessary to prove the commission of the offense on the particular day named in the information, provided the same be within the time limited by statute for the prosecution of the offense.

2. ———: ———. As a general rule, it is incompetent for the state in a criminal prosecution to prove that the prisoner at some other time committed an offense similar to the one with which he stands charged. This rule has its exceptions; but whether the crime of rape, or an assault with intent to commit that offense, falls within the rule or its exceptions, is not decided.
3. **Criminal Law: PROOF OF DISTINCT CRIMES: PRACTICE.** Where a single crime is charged in an information, and the state on the trial, for the purpose of proving the offense alleged, introduces testimony tending to prove similar, but distinct crimes, the proper practice is for the accused to move the court to require the prosecutor to elect on which transaction he will rely for a conviction.
4. The word "abuse," in the sense it is used in section 12 of the Criminal Code, is synonymous with "ravish."
5. **Criminal Law: PRESUMPTION OF INNOCENCE: REASONABLE DOUBT.** In a criminal prosecution the court instructed the jury, in substance, that the law presumed the accused innocent of the crime charged, and that such presumption continued until his guilt should be established by competent evidence beyond a reasonable doubt. *Held*, Sufficient to apprise the jury that their verdict must be based upon the evidence in the case alone, and that it was not error to refuse an instruction that "the information in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of the information in this case; that your personal opinion as to facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony."
6. **Argument in Absence of Court: MISCONDUCT OF ATTORNEY.** On the trial of a criminal cause the county attorney made a portion of his closing address to the jury while the trial judge was absent from the court room, and in said address said prosecutor, over the objection of the accused, misquoted the testimony in a material matter, to which counsel for the prisoner at the time objected, but, owing to the said absence of the judge, no ruling was had thereon. *Held*, Such error as demanded a reversal.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

*W. B. Comstock and Reese & Gilkeson*, for plaintiff in error.

*George H. Hastings, Attorney General*, for the state.

NORVAL, C. J.

At the September term, 1892, of the district court of Lancaster county, an information was filed by the county attorney, charging the plaintiff in error, on the 11th day of July, 1892, with assaulting one Maud Shaffer, a female child of the age of six years, with the felonious intent to carnally know and abuse her with her consent. Upon the trial the jury returned a verdict of guilty against the plaintiff in error, whereupon his counsel filed a motion for a new trial, which was overruled by the court, and an exception taken. Thereupon plaintiff in error was sentenced to confinement in the penitentiary for the term of four years.

The first assignment of error is based upon the ruling of the trial court on the admission of testimony. It appears that the prosecution was permitted to prove by the witness McGrew, over the objection of the defendant, that the accused, on the Friday preceding the 11th day of July, 1892, committed an assault upon the child Maud Shaffer with the intent to ravish her. It is insisted that said testimony tended to prove a similar, but a separate and distinct offense from the one with which the accused was charged in the information, and was therefore reversible error. This court in numerous cases has held that in criminal prosecutions, except in cases where it is necessary to show guilty knowledge, it is incompetent for the state to prove that the prisoner, at another time and place, committed an offense similar to the one with which he stands charged. (*Smith v.*

*State*, 17 Neb., 358; *Cowan v. State*, 22 Neb., 519; *Berg-hoff v. State*, 25 Neb., 213.) Such, undoubtedly, is the general rule, but whether the principle should be applied in a prosecution for rape, or an assault with intent to commit that crime, is not so clear. In the case of *Parkinson v. People*, 25 N. E. Rep. [Ill.], 764, it was ruled that, on a trial for rape, proof of two acts of rape committed by the prisoner on the prosecuting witness on different days is inadmissible. The following authorities hold that the admission of such evidence, in prosecutions like the one at bar, is not reversible error, but is competent for the purpose of showing the intent with which the assault charged was committed: *Sharp v. State*, 15 Tex. App., 171; *Williams v. State*, 8 Humph. [Tenn.], 585; *Commonwealth v. Lahey*, 14 Gray [Mass.], 91; *Commonwealth v. Nichols*, 114 Mass., 285; *State v. Wallace*, 9 N. H., 515; *State v. Marvin*, 35 N. H., 22; *State v. Knapp*, 45 N. H., 156; *Lawson v. State*, 20 Ala., 65; *People v. Jenness*, 5 Mich., 305. As we view the record, it is not necessary for us to now decide between the conflicting authorities. The testimony of the witness McGrew was objected to on the ground "that they have charged this man with an offense committed on a certain day, and now they are attempting to prove a different crime." The acts proved by the witness tended to establish the identical crime laid in the information, although they occurred prior to July 11, 1892, which is the day the information alleges that the offense was committed. The allegation in the information as to the time the crime was committed is not material. The state was not required to prove that the transaction occurred on the day alleged, but it was sufficient, if proven to have been committed within the time limited by statute for the prosecution of the offense. (*Yeoman v. State*, 21 Neb., 171.) True, the state introduced evidence of two distinct attempts of improper familiarities on the part of the plaintiff in error with the child, one on the date named in the information, and the

other on the Friday preceding. The testimony of the acts committed on July 11th was the last introduced on the trial and was received without any objection being interposed thereto by the plaintiff in error. Had the acts occurring on July 11th been first proved, possibly the state would have been required to confine its evidence to the transaction occurring on that day; at least the defendant would then have been in a position to raise the question in this court whether or not the evidence of what took place on Friday was admissible. Where an information charges a single crime, and on the trial the state, for the purpose of proving the act charged, introduces evidence tending to establish similar, but separate and distinct offenses, the proper practice is for the defendant to move the court to require the prosecutor to elect on which transaction he will claim a verdict. (Maxwell, Crim. Proc., 517; *State v. Crimmins*, 31 Kan., 376; *State v. Chicago, M. & St. P. R. Co.*, 77 Ia., 442.) No motion to elect was made in the case at bar.

It is further contended that the court erred in giving instruction No. 5, which reads as follows: "The information charges the defendant with an assault with an intent to commit rape. You are instructed that the attempt contemplated in this charge must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the accused; and although you find from the evidence that the defendant did, at the time charged in the information, take hold of the said Maud Shaffer, expose her private parts, and make an indecent exposure of his own person, yet if he desisted in his attempts to have sexual intercourse or abuse her, upon his own volition, without the intervention of circumstances independent of his own will, the law would presume that he did not intend to carnally know or abuse said Maud Shaffer; but, on the other hand, if you should find from the evidence, and beyond a reasonable doubt, that the defendant proceeded in efforts to car-

nally know or abuse the said Maud Shaffer, and desisted therefrom by reason of some intervening circumstance not dependent upon his own will, or by the intervention of some third party, then the law would presume that he did intend to carnally know or abuse the child in question; and this would be true even though you should believe from the evidence that sexual intercourse between the defendant and the said Maud Shaffer would be impossible, and that the only physical possibility in the attempt at sexual intercourse was to place the genital organs of the defendant in contact with the genital organs of the said child." The contention of plaintiff in error is, that the use of the word "abuse" in the instruction renders it erroneous and misleading. Section 12 of the Criminal Code provides that "If any person shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of fifteen years, with her consent, every such person so offending shall be deemed guilty of a rape, and shall be imprisoned in the penitentiary not more than twenty nor less than three years." It will be noted that the section quoted above uses the words "carnally know or abuse," and the instruction follows the language of the statute in that particular. The jury could not have inferred from the language of the court that they might find the prisoner guilty of the offense charged, even though they believed he did not intend to have sexual intercourse with Maud Shaffer. Webster defines the verb "abuse" thus: "to violate; to ravish;" and the noun "abuse" the same authority defines as "Violation; rape; as abuse of a female child." The jury doubtless understood that, unless the defendant attempted to have illicit intercourse or connection with the prosecutrix, there could be no conviction of an assault with intent to commit a rape.

Error is assigned because the court refused the following instruction requested by counsel for the prisoner:

"1. The mere verbal solicitation of a female child under the age of consent to permit sexual intercourse is not an attempt to commit rape, as the evil purpose, so long as it exists in contemplation only, is not within these provisions of the law. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offense but for the intervention of circumstances independent of the will of the accused; and although you find from the evidence that the defendant did, at the time charged in the information, take hold of the said Maud Shaffer, and expose her private parts, and make an indecent exposure of his own person, yet if he desisted without having sexual intercourse with the said Maud Shaffer, and such desistance was caused by the defendant's own volition, and without the intervention of circumstances independent of the will of the defendant, the law presumes that the defendant did not intend to have sexual intercourse with the said Maud Shaffer, and your verdict should be an acquittal of the crime as charged in the information, but the defendant might be guilty of an assault, or assault and battery."

The above request to charge was fully covered by the fifth instruction given by the court on its own motion; therefore, it was not error to refuse said request. (*Olive v. State*, 11 Neb., 1.)

Complaint is also made of the refusal of the court to give to the jury the defendant's instructions 2 and 3, which read:

"2. The jury are further instructed that the information in this case is of itself a mere accusation or charge against the defendant, and is not, of itself, any evidence of the defendant's guilt; and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of the information in this case.

“3. Your personal opinions as to facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but as jurors you can only act upon evidence introduced upon the trial, and from that, and that alone, you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony.”

It is true that a criminal information is no evidence of the guilt of the accused; but it was not necessary to so charge the jury in this case, nor was it error to refuse defendant's third request to charge, since the court in its instructions told the jury repeatedly, in substance, that the law presumes the defendant is not guilty of the crime charged in the information, and that this presumption of innocence continues until his guilt is established by competent evidence beyond a reasonable doubt. The jury knew from the charge of the court that their verdict must be based upon the evidence alone, and that if they entertained a reasonable doubt of his guilt, it was their duty to acquit. Plaintiff in error has no just cause for complaint on account of the instructions to the jury, or the court's refusal to charge as requested.

We are asked to reverse the case on the ground that the verdict is not sustained by sufficient evidence. Since there must be a new trial, for the reasons hereinafter stated, we refrain from expressing an opinion upon this branch of the case.

On the hearing of the motion for a new trial it was shown by the affidavit of W. B. Comstock, one of the prisoner's counsel, that the presiding judge, during the final argument of the cause, left the bench and retired from the court room in which the trial was being held, and allowed the argument of the cause to proceed in the absence of said judge, and that while the trial judge was thus absent, and after the argument for the defendant had closed, the county attorney, during his closing argument to the jury, stated

that he had noted carefully the evidence as it was given by the witnesses on the stand, and the evidence showed that the front door of the building in which the crime charged is alleged to have been committed was shut; that, when said statement was made, counsel for the prisoner objected thereto, and that on account of the judge being absent from the court room no ruling upon the objection could be made; that the county attorney continued his argument and insisted that the evidence did show that the said door was shut. The county attorney filed an affidavit in which he admits the facts substantially as stated above, except he denies that he insisted the door was shut, after his attention was challenged to the same by opposing counsel, but avers that as soon as objection was made to the statement he ceased addressing the jury until the judge returned to the court room, when the judge admonished the prosecutor to keep within the record, and the county attorney then said: "You jurors have heard the testimony. If I am wrong in my statement, I ask you not to consider it, but to be guided solely by the testimony. It may be that I have confused the testimony of the witnesses concerning the outer door with the inner door, or rather applied it to the inner door when it was given in reference to the outer." The undisputed evidence shows that the building in which it is alleged the offense was committed is situated on P street in the city of Lincoln; that the windows in the building were unobstructed, and that the front door facing on P street was not closed, but was standing wide open. It is claimed that the act charged in the information occurred in broad daylight in a building situated on one of the principal streets of the capital city. The accused took the witness stand in his own behalf and positively denied that he attempted any improper familiarities with the little girl. Owing to the conflicting character of the testimony, the fact of the door of the building being open at the time of the alleged occurrence was an important fact to be considered

Gravely v. State.

by the jury in arriving at a conclusion. Considerable latitude should always be allowed counsel in the discussion of facts before the jury; but an attorney, and especially a prosecutor in a criminal trial, has no right in arguing a cause to state as a fact any matter not borne out by the testimony. The argument in this case was clearly beyond legitimate bounds and was highly prejudicial to the accused. The trial judge likewise erred in permitting the argument to be made while he was absent from the court room. (*Thompson v. People*, 32 N. E. Rep. [Ill.], 968.) For the errors mentioned, the judgment is reversed and the case remanded for further proceedings according to law.

REVERSED.

## GREEN S. GRAVELY V. STATE OF NEBRASKA.

FILED JANUARY 16, 1894. No. 6143.

38	871
45	878
38	871
49	408
51	107
54	181
54	191

1. **Criminal Law: BURDEN OF PROOF.** In criminal prosecutions the burden of proof never shifts, but, as to all defenses which the evidence tends to establish, rests upon the state throughout; hence a conviction can be had only when the jury are satisfied, from a consideration of all the evidence, of the defendant's guilt beyond a reasonable doubt.
2. ———: ———. That rule applies not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed by the accused to justify or excuse the act charged.
3. **Homicide: SELF-DEFENSE.** Where, in a prosecution for murder, there is evidence tending to prove that the killing was justifiable on the ground of self-defense, the jury, in order to convict, must be satisfied beyond a reasonable doubt that the killing was not done in self-defense.
4. **Instructions: SELF-DEFENSE.** It is error to instruct that the accused is required to justify the act charged in the indictment, on the ground of self-defense, by a preponderance of the evidence.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

*William B. Price and Cobb & Harvey*, for plaintiff in error:

It was error for the court to instruct the jury that it devolves upon the defendant to justify his act, on the ground of self-defense, by a preponderance of the evidence. (*People v. Coughlin*, 32 N. W. Rep. [Mich.], 905; *State v. Cross*, 26 N. W. Rep. [Ia.], 62; *State v. Coleman*, 6 S. Car., 185; *Preuit v. People*, 5 Neb., 378; *Vollmer v. State*, 24 Neb., 838; *Farris v. Commonwealth*, 14 Bush [Ky.], 363; *Buckner v. Commonwealth*, 14 Bush [Ky.], 601; *Commonwealth v. York*, 9 Met. [Mass.], 93; *Bush v. Commonwealth*, 78 Ky., 268; *State v. Coleman*, 3 Am. Crim. Rep. [S. Car.], 180; *Erwin v. State*, 29 O. St., 186.)

*George H. Hastings, Attorney General*, for the state, to sustain the instruction, cited: *United States v. Kan-Gi-Shun-Ca*, 14 N. W. Rep. [Dak.], 437; *People v. Milgate*, 5 Cal., 127; *State v. Neely*, 20 Ia., 108; *Commonwealth v. York*, 9 Met. [Mass.], 93; *People v. Schryver*, 42 N. Y., 1; *People v. McCann*, 16 N. Y., 58; *Patterson v. People*, 46 Barb. [N. Y.], 625; *People v. Arnold*, 15 Cal., 476; *People v. Stonecipher*, 6 Cal., 405; *State v. Knight*, 43 Me., 11; *Commonwealth v. Knapp*, 10 Pick. [Mass.], 484; *Fife v. Commonwealth*, 29 Pa. St., 429; *Silvus v. State*, 22 O. St., 90; *State v. Turner*, Wright [O.], 20; *Commonwealth v. Webster*, 5 Cush. [Mass.], 305.

POST, J.

This was a prosecution in the district court of Lancaster county on the charge of murder in the first degree. A trial was had at the September, 1892, term, at which the accused was convicted of murder in the second degree, and

which he now seeks to reverse by means of a petition in error addressed to this court. The only question which calls for notice is that presented by the following instruction given by the court on its own motion :

“It is incumbent upon the state to show by proof, beyond any reasonable doubt, that on the 28th day of May, 1892, the defendant Green S. Gravely fired a pistol shot at Charles Thomas, and said shot took effect upon the person of said Charles Thomas, and from the effects of said shot, so fired, the said Charles Thomas died ; that said act took place in Lancaster county, state of Nebraska ; that said act of the defendant was done purposely, with deliberation and premeditation and malice. After the state has established its case, as above, it then devolves upon the defendant to justify his act, on the ground of self-defense, and this he is required to do only by a preponderance of the evidence.”

The particular objection to this instruction is the direction contained in the last sentence thereof, requiring the prisoner to justify the killing of the deceased, on the ground of self-fense, by a preponderance of the evidence. It is true there are many cases which sustain the rule as given by the trial court, but the decided weight of recent authority, including commentaries as well as decisions, is to the contrary. The rule seems to be that in criminal prosecutions the burden of proof never shifts, but rests upon the state throughout ; and before a conviction can be had the jury must be satisfied, upon all the evidence, beyond a reasonable doubt, of the affirmative of the issue presented, viz., that the prisoner is guilty in manner and form as charged. This rule applies, not alone to the case as made by the state, but to any distinct, substantive defense which may be interposed in order to justify or excuse the act charged. (See 1 Greenleaf Ev. [15th ed.], 81, notes ; 3 Greenleaf, Ev., 28, and note a ; *People v. Riordan*, 117 N. Y., 71 ; *People v. Downs*, 123 N. Y., 558 ; *Tiffany v. Commonwealth*, 121 Pa. St., 165 ; *Rudy v. Commonwealth*, 128 Pa. St., 500 ; *Commonwealth v. McKie*,

67 Mass., 61; *People v. Coughlin*, 65 Mich., 704; *Lilienthal's Tobacco v. United States*, 97 U. S., 237; *Howard v. State*, 50 Ind., 190; 1 Bish., Crim. Proced., 1048, 1051, 1066; 2 Bish., Crim. Proced., 669, 673.) Even in those jurisdictions in which the burden of proving a distinct defense rests upon the prisoner, the rule is generally held not applicable where it is sought to justify the act charged on the ground of self-defense. (See *Twedy v. State*, 5 Ia., 434; *State v. Donahoe*, 78 Ia., 486; *State v. Wingo*, 66 Mo., 181; *People v. Rodrigo*, 69 Cal., 601.) This case is clearly within the principle stated in *Wright v. People*, 4 Neb., 407, although the defense interposed therein was insanity. In the opinion of the court in that case LAKE, C. J., after conceding the rule to be different in England, concludes: "By this rule the burden of this defense is shifted from the prosecution to the defendant, which we think ought never to be done."

If a distinction can be said to exist on principle between self-defense and insanity in the application of the rule which imposes upon the state the burden in criminal cases, it is in favor of the first named defense. This is obvious from the rules applicable to homicides. For instance, to constitute the crime of murder the prisoner on trial must have killed the deceased purposely and with malice. If the killing was justifiable, it was not malicious within any definition of the term; hence, it was not murder, nor even manslaughter. Thus it is apparent that the prisoner is not required to establish the facts relied upon as a justification by a preponderance of the evidence. If, upon a consideration of all of the evidence, the jury entertain a reasonable doubt of any fact essential to establish guilt, such doubt should be resolved in his favor. But this rule does not affect the presumption of sanity, or of malice, where the killing is wholly unexplained. Hence, the state is not required in the first instance to prove that the prisoner was sane at the time of the commission of the act charged; and

where, on the case as made out against him, there is no evidence tending to rebut the presumption of sanity, evidence to the contrary must be produced by him; and where the evidence of the state discloses no circumstances tending to establish a justification of the act charged, the prisoner is required to produce evidence sufficient to create a reasonable doubt of his guilt in order to entitle him to an acquittal on that ground. In that sense the burden may be said to be upon the prisoner, but as to all defenses which the evidence tends to establish, the burden rests upon the state. As indicated by the instruction given, there was in this case evidence which tended to prove that the killing of the deceased was justifiable on the ground that the fatal shot was fired by the prisoner in defense of his person. The burden was, therefore, upon the state, and it was not entitled to a conviction unless the jury were satisfied beyond a reasonable doubt that the shooting was not justifiable. It follows that the giving of the instruction complained of is error, for which the judgment must be reversed and the case remanded for a new trial.

REVERSED.

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A. H. WEIR & COMPANY, APPELLANTS, V. W. B.  
BARNES ET AL., APPELLEES.

FILED JANUARY 16, 1894. No. 4920.

1. **Mechanics' Liens: MATERIALS FURNISHED.** The lien of a material-man for materials furnished for the erection of a building by virtue of an agreement with the contractor extends to such materials only as are used in, or delivered at, the building for use therein.
2. **Evidence examined, and held** not sufficient to entitle the plaintiff, a material-man, to a lien for materials furnished by virtue of an agreement with the contractor.

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Weir v. Barnes.

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APPEAL from the district court of Lancaster county.  
Heard below before HALL, J.

*Marquett, Dewees & Hall* and *A. G. Greenlee*, for appellants, cited: *Stewart-Chute Lumber Co. v. Missouri P. R. Co.*, 28 Neb., 44; *White v. Miller*, 18 Pa. St., 52.

*N. Rummons, contra.*

POST, J.

This is an action to enforce a mechanic's lien against certain property in the city of Lincoln and comes into this court by appeal from the decree of the district court of Lancaster county in favor of the answering defendant, McNeill, the owner of the property described in the petition, upon which in the summer of 1890 was erected a dwelling house, his co-defendant Barnes being the contractor. Plaintiffs, it is admitted, furnished material to Barnes which was used in the erection of said building. The lien is resisted, however, on the ground that it was not filed within the statutory time after the furnishing of said material. It is not necessary to set out the pleadings, which are in the usual form, or to make an extended reference to the issues, since the controversy in this court is confined to a single charge in the itemized account filed with the petition, viz., 100 feet of No. 4234 moulding, under date of June 17, 1890. The last item charged previous to the date above named was under date of June 2, and the account was filed with the county clerk on the 14th day of August following. It is apparent, therefore, that unless the 100 feet of moulding is chargeable to defendant under the provisions of the mechanics' lien law, plaintiffs cannot recover, for the reason that they were required to file a sworn statement of the amount due them from the contractor within sixty days from the furnishing of the material. (Sec. 2, ch. 54, Comp. Stats.) As said by the late

chief justice in *Foster v. Dohle*, 17 Neb., 633: "The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein."

The evidence upon the question at issue is as follows: Plaintiffs were in the habit of delivering material at the place it was required for use, and most of the lumber charged in their account was so delivered. On the day in question Burton Barnes, son of the contractor, with his father's team, procured from plaintiffs at their lumber yard 100 feet of moulding. At the time said moulding was delivered a ticket was made out and signed as follows:

"LINCOLN, NEB., June 17, 1890.

"A. H. Weir & Co.

"For McNeill, job No. 2, 100 ft. Ml'd. 4324. Del. at yd.

"Received above items. BURTON BARNES."

There is no evidence that the party above named was acting for W. B. Barnes, the contractor, or that he claimed such authority, or that he even represented that the moulding was for use in this particular building. A dealer who delivers material in good faith on the premises where a building is in process of erection, or reparation, is entitled to his lien, although it may have been wasted or destroyed. In other words, after delivery it is at the risk of the owner. But one who entrusts material to a third party, thereby assumes the risk of its delivery upon the premises sought to be charged. (*Foster v. Dohle, supra*; *Irish v. Pheby*, 28 Neb., 231.) In this case there is no evidence whatever of a delivery of the moulding in controversy. Had moulding of the character and quality charged been used in the finishing of defendant's house, that fact was susceptible of proof and would, at least, have been a circumstance tending to sustain the plaintiffs' claim; but no such proof was offered. It is true that defendant testifies on cross-examination that there is moulding in his house, but plaintiffs' counsel did

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Aultman v. Grimes.

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not pursue the subject to the extent of inquiring the kind or quality thereof, or when it was placed therein. It also appears that defendant was engaged in the erection of more than one building, for the charges in plaintiffs' books, introduced in evidence, are all against Barnes on account of "McNeill job No. 2." Assuming that we are warranted, from the circumstances of the case, in presuming that the moulding was ordered for the contractor, there is still no proof that it was used in or delivered upon "job No. 2." Experience has demonstrated the wisdom of the mechanics' lien law. It is likewise settled by abundant authority that it should be liberally construed in favor of the mechanic or material-man, by means of whose labor or capital the property has been enhanced in value. But by no liberal or reasonable construction can the owner of property be charged in a case like this. The filing of the lien within the statutory time is just as essential as the furnishing of the material. Having failed to take the steps necessary to charge the property of the defendant for the material furnished to the contractor, plaintiffs must look to the latter for their satisfaction. The judgment of the district court is

**AFFIRMED.**

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**AULTMAN, MILLER & COMPANY V. WILLIAM GRIMES.**

FILED JANUARY 16, 1894. No. 4772.

- 1. Liability of Sheriffs for Failure of Duty in Serving Writs.** A sheriff who has received for service an order of attachment, and garnishee notices for alleged debtors of the defendant, will not be held liable in an action by the plaintiff in the attachment suit on the sole ground that he procured like notices to be served on the same parties as garnishees in a suit by attachment, in which he is plaintiff against the same defendant, after the receipt of the notices first mentioned and before service thereof.

2. **Pleading.** Petition examined, and *held* not to state a cause of action.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

*Daniel F. Osgood*, for plaintiff in error.

*S. P. Davidson* and *J. Hall Hitchcock*, *contra*.

POST, J.

This was an action by the plaintiff in error in the district court of Johnson county against the defendant in error, William Grimes, on his official bond as sheriff of said county. The allegations of the petition are substantially as follows: On the 20th day of October, 1888, the plaintiff in error commenced an action in the district court of Johnson county against one George H. Dennett to recover the sum of \$1,417, and caused an order of attachment to be issued in said action, and also garnishee notices for Charles M. Chamberlain and the Chamberlain Banking Company, as supposed debtors of the defendant therein, which writs were, on the day above named, delivered to defendant in error as sheriff for service; that the latter intentionally neglected and refused to serve said writs until the 22d day of October; that in the meantime defendant in error had commenced an action in the county court of said county against said Dennett, to recover the sum of \$——, and caused an order of attachment to be issued in said action, and also garnishee notices for the said Charles M. Chamberlain and the Chamberlain Banking Company, which last named notices defendant in error, as sheriff, served on the aforesaid garnishees previous to the service of the notices issued in the action of plaintiff in error; that on the 14th day of December, 1888, said garnishees answered in the action of the defendant in error, admitting that they had in their possession property and money of the defend-

ant Dennett amounting in the aggregate to \$2,900, as security for a debt of \$2,700 due and owing by the latter to them, whereupon they were ordered to pay into court a sum sufficient to satisfy the judgment of defendant in error, with costs, to-wit, \$162.85; that the last named sum was paid into court by the garnishees, in obedience to the order of the county court, on the 5th day of February, 1889, and turned over to the defendant in error; that subsequently the action against Dennett came on for trial in the district court and judgment was rendered therein for plaintiff in error in the sum of \$1,417, which remains wholly unsatisfied; that had defendant in error served said notices in the order in which they were received by him, the said sum of \$162.85 would have been due and payable on the claim of the plaintiff; wherefore it is damaged, etc. The answer is in the nature of a demurrer to the petition. A second cause of action set out in the petition need not be noticed, since it is not referred to in the brief of counsel. A trial in the district court resulted in a verdict and judgment for the defendant in error.

Practically the only question argued in this court is that of the sufficiency of the petition. It will be observed that the wrong complained of is not a failure to serve the notices upon the garnishees, but the previous service of like notices in his own case by the defendant in error. It does not appear from the petition that the garnishees have ever answered or been discharged in the action of plaintiff, or that they have not in their possession sufficient property to satisfy the judgment in the district court. The only allegation on the subject is that the garnishees in the action, by defendant in error, in the county court answered that they had in their possession property and money of Dennett of the value of \$2,900, to secure an indebtedness of the latter to them of \$2,700. It is not insisted that there exists any special provision of statute making a sheriff liable for procuring a writ of attachment to be served in an action to

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which he is a party, although the effect thereof may be to defeat the claims of other creditors; nor is there any claim that the garnishee notices were not served and returned within the statutory time. If defendant in error is to respond in damages for the acts complained of, it must be on the ground that plaintiff in error has suffered damage in consequence thereof; but on that question the petition is silent. In order to state a cause of action for the wrong complained of, it should have been alleged either that the amount paid into court to satisfy the judgment of defendant in error exhausted the funds of Dennett in the hands of the garnishees, or that the latter had answered and been discharged in the action against Dennett in the district court; nor is it alleged that Dennett is insolvent, or that the amount of the judgment could not be made on execution against him. There is a further question presented by the record, viz., the validity of the service by defendant in error of the garnishee notices in his own action, which will not be noticed, as the judgment must be affirmed for reasons already stated.

AFFIRMED.

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MARGUERITE ALTSCHULER V. WILLIAM COBURN,  
SHERIFF.

38	881
52	178
54	767

FILED JANUARY 16, 1894. No. 4670.

1. **Trial: CROSS-EXAMINATION: FRAUD.** A wide latitude will generally be allowed in the cross-examination of witnesses where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction.
2. **Replevin: EVIDENCE.** Where property in the possession of M. is taken to satisfy an execution against F., declarations of the former in disparagement of his title *held* admissible in an action by A. to recover the property from the sheriff, there being evidence tending to prove a conspiracy between A., F., and M. to

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defraud the creditors of F. by investing M. with the apparent title thereof.

3. **Instructions: BURDEN OF PROOF.** It is not error to instruct that the party on whom the burden rests is required to establish his cause of action or defense by a fair preponderance of the evidence.
4. **Review: HARMLESS ERROR.** A judgment will not be reversed on account of errors which are not prejudicial to the complaining party.
5. **Evidence examined, and held to sustain the judgment of the trial court.**

ERROR from the district court of Douglas county. Tried below before DOANE, J.

*B. G. Burbank*, for plaintiff in error:

The court erred in giving the following instruction: "The burden of proof in this case is on the plaintiff to show by a preponderance of the testimony her right to the possession of the property in controversy at the commencement of this suit; and unless she has satisfied you, by a fair preponderance of the testimony, of her right to such possession, she cannot recover in this action." It requires the plaintiff to produce before the jury a greater degree of evidence than required by law. (*Search v. Miller*, 9 Neb., 26; *Marx v. Kilpatrick*, 25 Neb., 118.)

*Hall & McCulloch*, contra:

The use of the words "fair preponderance" in the instruction was not error. (*Dunbar v. Briggs*, 18 Neb., 97.)

Transactions between relatives by which creditors are deprived of their just dues should be scrutinized strictly, and the *bona fides* of such transactions clearly established. (*Fisher v. Herron*, 26 Neb., 130; *Bartlett v. Cheesbrough*, 23 Neb., 767; *Plummer v. Rummel*, 26 Neb., 142.)

Transactions between a failing debtor and his relatives are always suspicious. They are to be regarded with strict

scrutiny. They are badges of fraud unless clearly explained. (*First Nat. Bank of Omaha v. Bartlett*, 8 Neb., 319; *Aultman v. Obermeyer*, 6 Neb., 260; *Thompson v. Loenig*, 13 Neb., 386; *Stevens v. Carson*, 30 Neb., 544; *Lipscomb v. Lyon*, 19 Neb., 511; *Hill v. Fouse*, 32 Neb., 638.)

Post, J.

This was an action of replevin in the district court of Douglas county in which the plaintiff in error, Marguerite Altschuler, sought to recover certain personal property, which is thus described: "All the goods and chattels now being contained in the two-story building known as 'No. 623 North Sixteenth Street,' in the city of Omaha, and all the fixtures and other personal property connected with the saloon in said building contained, of the value of \$5,000." A trial resulted in a verdict and judgment for the defendant below, whereupon the case was removed to this court by petition in error.

The plaintiff claims to be the owner in her own right of the property in controversy, while the defendant claims, as sheriff of Douglas county, by virtue of a levy to satisfy certain executions against one John A. Freyhan. From the bill of exceptions it appears that for some time prior to September, 1886, Freyhan had been engaged in the saloon business in Omaha. Some time in said month he failed, and is still owing more than \$10,000 of debts contracted previous to his failure. In the month of April following, according to the contention of the plaintiff, she opened a saloon in Omaha, with one McGrath as manager, and that the property seized to satisfy the executions against Freyhan consists of the fixtures and a part of the stock of liquors owned by her, while the theory of the defendant is that the saloon in question and the liquors and fixtures therein were, at the time they were taken by him, the property of Freyhan, and that the plaintiff's alleged ownership is a

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mere pretense for the purpose of assisting him, Freyhan, to defraud his creditors. The plaintiff, who is Freyhan's sister, resides with her husband at Missouri Valley, Iowa, and does not appear to have visited Omaha at the time she claims to have embarked in the business of saloon-keeping in that city, and if she ever took an active part in the management of the business, that fact is not apparent from the record. On the 16th day of May, 1887, which was about a month subsequent to the opening of the saloon, Freyhan and McGrath entered into an agreement in writing which, so far as material in the controversy, is as follows:

"This agreement, made at Omaha this 16th day of May, 1887, by and between John A. Freyhan, as agent, of Omaha, party of the first part, and S. M. McGrath, of the same place, party of the second part, witnesseth:

"That said party of the second part shall open and conduct in his own name a wholesale and retail liquor and cigar business in said city of Omaha, under the direction of said party of the first part.

"That all of the assets and property used in and about said business, consisting of fixtures, wines, liquors, cigars, etc., and all the moneys, accounts, and other assets arising out of or accruing from or furnished to be used in said business shall belong to, and be and remain the property of, the party of the first part, as agent, as aforesaid, the intention being by this agreement to cover all property now held by said McGrath for said purpose, and all which may hereafter be purchased for or furnished for use in said business and the receipts, issues and profits thereof.

\* \* \* \* \*

"Said party of the second part shall, if directed by said party of the first part, execute to all parties who may have furnished, or may hereafter furnish, property, or stock, or cash for use in said business a note or notes, or obligations therefor, and secure the same by mortgage on the fixtures, stock, and property aforesaid, or any part thereof. And

said party of the second part shall carry on said business at all times as directed by said party of the first part as agent aforesaid.

\* \* \* \* \*

“Nothing herein contained shall be ever construed so as to allow the party of the second part to call in question the agency of the party of the first part or the party whom he represents.

“In the event that said party of the second part shall fail to comply with any of the agreements herein contained on his part to be performed, then said party of the first part shall, at his option, be entitled to immediate possession of all the property, fixtures, and assets used in and about said business, and all moneys arising in any manner out of the same, and to the immediate possession of the buildings and premises whereon said business is being conducted, and the business there being carried on and being conducted within or in any manner thereunto appertaining, the possession of this agreement being sufficient authority upon which the party of the first part, his agents or assigns, may demand, enforce, and receive the immediate possession of said premises, property, and business aforesaid.

“This agreement is made by said party of the first part with said party of the second part as a personal agreement, which said party of the second part shall have no right to assign, transfer, or in any manner dispose of, and an attempt so to do will terminate this contract at the option of the party of the first part.

“Witness our hands the day and year first above written.

“JOHN A. FREYHAN.

“S. M. McGRATH.

“Witness to signatures:

“W. J. MARTIN.

“GEO. F. WITTUM.”

It will be observed that the name of Freyhan's alleged principal is not mentioned in the above agreement, nor does

it appear that the identity of the party represented by him was ever disclosed to McGrath. The latter, it is admitted, applied for and received the license in his own name, and by a sign over the door announced that he was proprietor of the saloon. The business continued under his management until some time during the fall of 1887, from which time, until it was closed out by the sheriff in January following, it was conducted by a bartender employed by Freyhan. A fact which should be noted in this connection is that McGrath was not produced as a witness; nor did the plaintiff testify in her own behalf. A written power of attorney was introduced in evidence which appears to have been executed by the plaintiff on the 2d day of April, 1887, in which it is recited that "John A. Freyhan is appointed her lawful attorney with power to sell and convey by good and sufficient deed, with full covenants and warranty, any and all of the real estate now owned by me or may hereafter be purchased by me, hereby giving and granting to my said attorney full power to do and perform every act necessary to be done in the premises as fully as I could do myself if personally present, also giving and granting unto my said attorney, John A. Freyhan, full power and control over every species of personal property which I may now be in possession of, or may hereafter become possessed of, allowing and delegating to him authority to draw checks, make, sign, deliver and execute notes, contracts, and each and every kind of business which I myself could do relative to my own individual property, and that he is hereby empowered to do the same as fully as I myself could do were I personally thereat, hereby ratifying and confirming all that my said attorney shall do by virtue hereof."

It appears that the original stock of liquors, as well as additions thereto, were purchased on credit from Samuel Westheimer, of St. Joseph, Missouri. Referring to the first order Freyhan testifies:

Q. Did Mrs. Altschuler order the goods, or did you?

A. No, sir; Mr. McGrath placed the orders with Mr. New, the agent of Mr. Westheimer, in my presence, and I acted for Mrs. Altschuler.

Q. In guarantying and confirming the payments of accounts, Mr. McGrath did so under your instruction?

A. Yes, sir.

Q. Mrs. Altschuler wasn't present?

A. No, sir.

It does not appear, except from statements rendered September 14 and October 27, that the plaintiff was known to Westheimer, the business with him having been transacted in the name of McGrath. It is admitted that she advanced no money to pay for the liquors previous to the commencement of this action, and that all payments prior thereto were made from receipts of the saloon, but that the sum of \$1,100 was paid October 25 from the proceeds of the property taken under the writ of replevin. The testimony of Freyhan is in some respects unsatisfactory and apparently evasive. For instance, he cannot tell positively whether the surety on the replevin bond was procured by the plaintiff or himself. We are not disposed to comment upon the facts above stated. The jury found Freyhan, and not the plaintiff, to be the owner of the property in controversy, and that finding we must accept as conclusive.

2. Exception was taken to the ruling of the court in permitting the defendant to cross-examine Freyhan with respect to the disposition of certain property by him. Counsel for the plaintiff overlooks the fact that the witness named had testified on his direct examination that plaintiff was the owner of the property, and in effect that his transactions with her were in good faith and not fraudulent as to his creditors. But assuming that he did not expressly or by implication assert that such transactions were free from the taint of fraud, we think the facts disclosed by him, giving them the most favorable construction, are of so

suspicious a character as to fully warrant the examination allowed. A wide latitude will generally be allowed in cross-examinations, where the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction. (See *Anderson v. Walter*, 34 Mich., 113.)

3. The next assignment is the admission in evidence over the objection of the plaintiff of certain records of the county court, to-wit, the petition, affidavit for attachment, motion to discharge attachment, affidavit for garnishment, and prior execution and return thereof, all in the case of *Groff v. Freyhan*. It should be mentioned that a second execution to satisfy the judgment above named is one of the writs upon which the defendant relies in the action, and the petition therein was properly received in evidence. The other records were received as tending to establish the insolvency of Freyhan, a fact which the jury were authorized to consider in determining the issue of fraud. Whether or not the records were admissible for that purpose we need not now determine, since if the ruling complained of was erroneous, it was error without prejudice, for the reason that Freyhan's insolvency had been conclusively established by his own testimony.

4. Exception was taken to the admission in evidence of the numerical index of deeds to show the record title of the south 20 feet of lot 12, block 80, in South Omaha. That evidence was material upon one proposition only, and which was collateral to the main controversy. The defendant attempted to show by the cross-examination of Freyhan that he (the witness) had indemnified the surety on the replevin bond, Moritz Meyer. The testimony of the witness, while not satisfactory, is to the effect that Meyer was secured by property in South Omaha, which the plaintiff "had given to Westheimer as security." The record introduced shows a conveyance of the property described by the plaintiff to Rachel Robinson by the latter to Samuel Westheimer, and by the last named to Moritz Meyer.

Its admission, if error, was harmless, since it tends to sustain rather than contradict the claim of the plaintiff.

5. The defendant was permitted to prove declarations of McGrath while the latter was acting as manager of the saloon, in substance, that although it was conducted in his name it was owned by Freyhan, who could not carry on the business in his own name for the reason that he was still owing debts contracted previous to his failure. The ground of the objection is that such statements do not relate to any matter within the scope of the authority of McGrath as the representative either of the plaintiff or Freyhan and are not therefore a part of the *res gestæ*. It does not follow, however, that the question presented by this ruling is to be determined by an application of the principles which govern the law of agency. The contention of the defendant has been throughout that Freyhan was engaged with McGrath in a conspiracy to defraud the creditors of the former, in which he was aided and abetted by the plaintiff. It is sufficient to say that there was, in our judgment, evidence tending to sustain that contention, and sufficient as a foundation for the admission of the declaration offered.

6. Exception was taken to the following instruction: "The burden of proof in this case is on the plaintiff to show by a preponderance of the testimony her right to the possession of the property in controversy at the commencement of this suit, and unless she has satisfied you by a fair preponderance of the testimony of her right to such possession, she cannot recover in this action." The criticism of the instruction is directed to the expression "fair preponderance" of the evidence used therein. In support of this exception we are referred by counsel to *Search v. Miller*, 9 Neb., 26, and *Marx v. Kilpatrick*, 25 Neb., 118, in which the expression "clear preponderance of the evidence" is condemned. But in *Dunbar v. Briggs*, 18 Neb., 94, an instruction was approved which required a counter-claim to

be established by a fair preponderance of the evidence. The last case is in point and decisive of the question presented by this exception. In the opinion of the writer, any attempt to qualify that term by subtle distinctions between a *clear preponderance* and a *fair preponderance* of the evidence is to be deprecated as an unnecessary refinement and tending to confuse rather than enlighten the average mind. "Preponderance" is defined by Webster thus: "An outweighing; superiority of weight." There can be no preponderance while the evidence is evenly balanced, but when the scale inclines toward one side, we know the weight or superiority of evidence is with that party. Manifestly there can be no such outweighing unless there is both a clear preponderance and a fair preponderance. As well might we attempt to apply degrees of comparison to the term "equilibrium" by holding the evidence in one case more evenly balanced than in another. Applicable in this connection is the language used in Stephen's General View of the Criminal Law, p. 262, with reference to the term "reasonable doubt," where it is said that an attempt to give a specific meaning to the word "reasonable" is "trying to count what is not number, and measure what is not space."

7. Lastly, it is argued that the court erred in the giving of the following instruction: "The jury are instructed that conveyances by and transactions between a failing debtor and his relatives are always suspicious and to be regarded with strict scrutiny, and such transactions are badges of fraud, unless clearly explained." It is not claimed that the instruction does not correctly state the law as an abstract proposition, but it is contended that it is not applicable to the facts disclosed by the evidence. To that proposition we cannot give our assent. Transactions like those shown between the plaintiff and Freyhan are regarded with suspicion and are universally held to be evidence of fraud. We find no prejudicial error in the record and the judgment is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, v. JARED  
B. AYER ET AL., IMPEADED WITH ALEXANDER  
LILIENCRON ET UX., APPELLANTS.

FILED JANUARY 16, 1894. No. 5926.

38	891
42	787
38	891
44	137
38	891
50	399
151	762
54	506
38	891
58	431

1. **Appeal: LACHES OF APPELLANT: JURISDICTION.** The provision of section 675 of the Code, for the taking of appeals within six months after the date of the decree or final order appealed from, is mandatory, and a compliance therewith essential in order to confer jurisdiction upon this court, unless the failure is in nowise attributable to the laches of the appellant.
2. **Failure to File Transcript for Review: BILL OF EXCEPTIONS.** The fact that the appellant, through no fault or negligence of his own, is unable to procure the allowance of a bill of exceptions within the time allowed for taking an appeal, will not excuse the filing of the transcript required by law within six months after the date of the decree or order appealed from.
3. **Permission to File Petition in Error Upon Dismissal of Appeal: TIME.** The appellant will be permitted to file a petition in error in this court upon the dismissal of his appeal in order to secure a review of the decree appealed from upon exception, provided such proceeding be commenced within one year from the date of such order or decree.
4. The case of *Bazzo v. Wallace*, 16 Neb., 290, distinguished.

MOTION by appellee to dismiss appeal from the district court of Douglas county, and motion by appellants for leave to file a petition in error. *Appeal dismissed. Motion for leave to file petition in error overruled.*

*John P. Breen and E. R. Duffie, for appellants.*

*Lake, Hamilton & Maxwell, contra.*

POST, J.

This was an action by the appellee, the Omaha Loan & Trust Company, in the district court of Douglas county

for the foreclosure of a mortgage executed by J. B. Ayer on lots 1, 2, and 3, in block 10, in Rodgers' addition to the city of Omaha. The appellants Alexander Liliencron and wife were made parties defendant, and answered, alleging title to the mortgaged property. They allege further that their co-defendant Ayer, by means of fraud and falsehood, induced them to execute in his name a deed by which they conveyed to him the legal title to said property, and that while holding such legal title he executed the mortgage described in the petition in fraud of their rights. They also charge that the plaintiff accepted said mortgage and made the loan represented thereby with full knowledge of their rights. The reply puts in issue all of the above allegations. On the 6th day of January, 1892, a final decree was rendered in favor of the plaintiff in accordance with the prayer of the petition.

On the 5th day of January, 1893, appellants filed in this court their bill of exceptions and a transcript of the proceedings in the district court, accompanied by a motion in the following language: "And now on this 5th day of January, 1893, the defendant cross-petitioners herein, Alexander Liliencron and Franciska Liliencron, file in this court their transcript of the record and bill of exceptions in this case and reserving the right to make application hereafter to this court to have this whole case reviewed on petition in error, if this court shall deem and decide that this appeal has not been taken in time, they ask that this case may be heard and considered as upon appeal, and shall be heard and determined as though filed in this court within six months from the rendition and filing of the decree herein. In asking this, and as a reason therefor, they refer to the showing on file with their bill of exceptions as to the diligence used in endeavoring to settle their bill of exceptions in the lower court, and the unavoidable delay in having their appeal perfected within the time provided by statute." No action was taken on the above motion, nor

was it called to our attention until the 28th day of June, 1893, on which day a motion was made by appellee to dismiss the appeal on the ground that it was not taken within the time allowed therefor by law. Appellants, it is conceded, show by the affidavits referred to in their motion that they were unable, through no fault or negligence of their own, to procure the allowance of a bill of exceptions until about the time of the filing of the case in this court. That fact will not, however, excuse the failure to file the transcript required by section 675 of the Code, within six months after the date of the decree appealed from.

In *Schuyler v. Hanna*, 28 Neb., 604, it was held that the filing of a transcript of the pleadings and final decree will confer upon this court jurisdiction in cases brought here by appeal; and in *Fitzgerald v. Brandt*, 36 Neb., 683, it was held that the provision of the Code for the taking of appeals in equity causes within six months is mandatory, and a compliance therewith essential to give this court jurisdiction, unless the failure is in nowise attributable to the laches of the appellant. It is not deemed necessary to examine the earlier cases in this court, for whatever authority may be therein found for a different rule the law must be regarded as settled by the cases above cited. The motion to dismiss was accordingly sustained, whereupon the appellants moved for leave to file a petition in error in order to secure a reversal of the decree, on account of errors to be alleged therein. It is provided by section 592 of the Code that "no proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or the making of the final order complained of," etc. By section 584 it is provided that the proceeding to secure a reversal, vacation or modification of a judgment or decree by this court shall be by a pleading entitled "a petition in error," and that "thereupon a summons shall be issued and served, or publication made, as in the commencement of an action." The

Code further provides, section 19, that "an action shall be deemed commenced within the meaning of this title as to the defendant at the date of the summons which is served on him." A summons issued within the time authorized by statute will give the court jurisdiction, although served after the expiration of such period. But in all cases the summons must be issued before the bar of the statute is complete. (*Rogers v. Redick*, 10 Neb., 332; *Baker v. Sloss*, 13 Neb., 230; *Republican Valley R. Co. v. Sayer*, 13 Neb., 280.) The foregoing, like other provisions limiting the time within which appellate proceedings may be instituted, are jurisdictional, and cannot be enlarged by the court. This case is clearly distinguishable from *Bazzo v. Wallace*, 16 Neb., 290. The facts of that case do not clearly appear from the opinion of the court, but it is said therein that "there was a general appearance of the defendant within the year by his attorney entering into an agreement in writing to continue the case." The inference from the above language is that the petition in error, which was essential in order to confer jurisdiction, was on file at the time of the appearance. We do not understand that case to be authority for the proposition that the filing of the transcript and evidence in this court within one year from the date of a final order or decree, will operate to enlarge the time allowed for proceeding by petition in error, and as authority it should be restricted to cases within the facts stated therein. Motion to dismiss appeal sustained. Motion for leave to file petition in error overruled.

JUDGMENT ACCORDINGLY.

NEW ENGLAND LOAN & TRUST COMPANY, APPELLEE,  
V. JAMES KENNEALLY ET AL., APPELLANTS.

FILED JANUARY 16, 1894. No. 5582.

1. **Fire Insurance: ASSIGNMENT OF POLICY.** The general rule is that a fire insurance policy is a personal contract with the party insured, and does not run with the land or pass to the purchaser by a sale of the property insured, and any assignment of the policy, to be valid and operative, must be with the knowledge and consent of the insurer, especially where the policy, by its terms, requires the assignment, if any, to be assented to by the company.
2. **Foreclosure of Mortgage: INSURANCE: SET-OFF AND COUNTER-CLAIM.** G., by purchase of property from K., who, prior to the sale to G., had mortgaged the property to N., and had obtained insurance on the property in his own name, the policy of insurance having a clause attached by which the loss, if any, was made payable to N., the mortgagee, there being no assignment of the policy to G., does not acquire any right, in the event of the destruction of the buildings on said property by fire after the sale to him, to set-off or counter-claim the amount of said policy, or any part thereof, against the amount of the mortgage, in a suit by N. to foreclose the same, because of the neglect of N. to perform any of the conditions of the mortgage clause, and in which action a deficiency judgment is asked against G. as a part of the relief prayed for, G. having, in the sale of the property to him, assumed and agreed to pay the mortgage to N.
3. **Vendor and Vendee: LIABILITY OF PURCHASER FOR PAYMENT OF MORTGAGES.** Where a party, purchaser of property, buys the property subject to a certain mortgage of \$1,200, and the interest thereon, which he assumes and agrees to pay, he does not become personally liable for the payment of a second mortgage on the premises which is not shown by the pleadings or evidence to be any part of the first mortgage, or any part of the interest thereon.

APPEAL from the district court of Lancaster county.  
Heard below before FIELD, J.

*Wooley & Gibson*, for appellants.

*Balliet & Points*, contra.

HARRISON, J.

The New England Loan & Trust Company commenced an action in the district court of Lancaster county to foreclose two mortgages, one in the sum of \$1,200, and one in the sum of \$——, executed and delivered to it December 26, 1887, by James Kenneally and Eliza Kenneally, and covering the following property, situated in the county of Lancaster and state of Nebraska, to-wit: "Lot twelve (12), in block five (5), 'Pleasant Hill' subdivision of lots three (3), four (4), five (5), and six (6) of the northeast quarter of section thirty-six (36), township ten (10) north, of range six (6) east, of the sixth principal meridian, with all the appurtenances thereto belonging." The petition contained the usual allegations of a petition in such actions and also a copy of the conditions of the mortgages, one of which provided that the Kenneallys should keep the buildings on said premises insured in some responsible and approved company or companies for the benefit of the mortgagee, in a sum not less than \$2,000, and deliver the policies and renewal receipts to mortgagee. The petition also contained the following allegation: That Benjamin A. Gibson and Francis N. Gibson each agreed and assumed to pay this plaintiff the said mortgages made and executed by James Kenneally and wife to this plaintiff, and that said agreement was a part of the purchase price of said land from Kenneally to Gibson, and from Gibson to Gibson. There was a deed executed, as appears from the evidence, from the Kenneallys to Benjamin A. Gibson, and one from Benjamin A. Gibson to Francis N. Gibson, in each of which there was a clause whereby the grantee assumed and agreed to pay the \$1,200 mortgage and the interest thereon. The prayer of the petition was for foreclosure of the mortgages and de-

ficiency judgments against the Kenneallys and the Gibsons. The Kenneallys did not appear, made no defense, and were defaulted. The Gibsons filed separate answers, but as the defenses were the same, and the pleadings in substance very similar, they may be considered together, and one statement here of the issues raised will suffice. These answers, after admitting the execution and delivery of the notes and mortgages, and the purchase of the property from the Kenneallys, alleged that such purchase was made January 10, 1888. The deed to Benjamin A. Gibson is of date January 25, 1888. This deed, it is shown by the testimony, should have been made to both the Gibsons, defendants herein, and was by mistake made to Benjamin A. Gibson alone. The deed from Benjamin A. Gibson to Francis N. Gibson is of date June 18, 1888. The answers further alleged that on the 10th day of January, 1888, in pursuance of the covenants in the mortgage contained, insurance policy No. 978 was procured by James Kenneally to be issued to him by the Insurance Company of North America, insuring the buildings on said premises against loss or damage by fire in the sum of \$2,000. That the sum proven to be due on said policy in case of loss or damage by fire was, by the terms of the mortgage clause attached to said policy, made payable to the plaintiff, the New England Loan & Trust Company, mortgagee, or beneficiary, or its assigns, subject to the following stipulations, to-wit:

“It is agreed that this insurance, as to the interests of the mortgagee, or beneficiary, or its assigns only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer or conveyance of the premises, provided the mortgagee or beneficiary shall notify this company of any change of

ownership or increase of hazard which shall come to the knowledge of such mortgagee or beneficiary, and shall have permission for such change of ownership or increase of hazard duly indorsed on the policy."

There is a further averment that the policy was immediately forwarded by Kenneally to the plaintiff, and by plaintiff kept and retained; that defendants were not permitted to see and examine it, and were ignorant of its conditions until March, 1889. It is further alleged in the answers that the buildings on said premises, covered by the policy, were, on the 14th day of December, 1888, entirely destroyed by fire, and that due proofs of loss were made. The answers further alleged that the plaintiff was notified immediately of the transfer and conveyance of the property by the Kenneallys to the Gibsons, and that plaintiff willfully, negligently, and carelessly omitted and refused to give notice to the Insurance Company of North America of such transfer, by reason of which negligence and failure on the part of plaintiff to so notify the insurance company, the said company refuses to pay the amount of the loss under the policy to the damage of defendants in the sum of \$2,000. Defendants pray for a finding in their favor in the sum of \$2,000, for a cancellation of the notes and mortgages, and a judgment against plaintiff for the balance, if any, of the \$2,000, after deducting therefrom the amount of the notes and mortgages. The plaintiff filed replies to the answers, which were in effect general denials. A trial of the issues was had February 26, 1892, in the lower court, and findings made by the court that there was due on the first mortgage the sum of \$1,589.85; that the defendants Benjamin A. Gibson and Francis N. Gibson had assumed and agreed to pay the same, and that there was due the plaintiff upon said note and mortgage from the defendants James and Eliza Kenneally and Benjamin A. and Francis N. Gibson the sum of \$1,589.85. There was a further finding that there was due plaintiff

from James and Eliza Kenneally on the note secured by the second mortgage the sum of \$174.58. There was also a finding against the answer and counter-claim of Francis N. Gibson, and that he was not entitled to the relief prayed for in said answer. There was a decree of foreclosure for said sums and interest at seven per centum per annum from date of decree, the date of the decree being June 17, 1892.

The evidence shows: The execution and delivery of the notes and mortgages by James and Eliza Kenneally to plaintiff; the issuance of the policy of insurance to James Kenneally with mortgage clause attached, as set forth in the answers, and that the same was sent to plaintiff and retained by it until sent to defendants Benjamin A. and Francis N. Gibson at their request, during February or March, 1889; that plaintiff was notified or informed of the transfer or conveyance of the property to the Gibsons on or about July 31, 1888; that plaintiff did not notify the insurance company of the transfer of the property to the Gibsons; that on December 14, 1888, the buildings on the premises and covered by the policy of insurance were totally destroyed by fire; that the policy of insurance was never assigned to the Gibsons or either of them; that the insurance had been obtained on the buildings by James Kenneally prior to the sale of the premises to Benjamin A. Gibson, but he had not paid the premium and same was paid by the Gibsons, but the evidence does not show to whom they paid it, or whether they paid it for Kenneally, as his indebtedness to the company, or its agent, or on their own account; that the policy contained the following condition as to change of ownership of the property insured, and assignment of the policy: "If the assured shall, by voluntary transfer or conveyance, dispose of the property covered by this policy, or of an undivided interest therein, or a change shall take place in the membership of the firm or copartnership for whose benefit the insurance

hereunder was effected, this policy may be assigned to the party or parties succeeding to the ownership of the property, provided the company shall first consent thereto by indorsement hereon; otherwise this insurance shall cease from the date of such change in ownership."

The controlling fact in this case as to the rights of the defendants Gibson in the proceeds of the policy of insurance, or its proper enforcement, or its being kept alive and in force by the plaintiff, if any such rights could in any event be or accrue to Kenneally or to defendants as assignees of Kenneally, must clearly, it seems to me, depend upon whether or not the policy was ever assigned to the Gibsons, and it is unquestionably shown by the evidence that it never was. In this case the question is not left an open one, but by a condition of the policy it is made obligatory upon the party or parties receiving a conveyance or transfer of the property, to have the policy assigned and consent of the company to such assignment indorsed on the policy; if not, the insurance to cease. The general rule of law is, that a policy of fire insurance is a personal contract with the party insured and does not run with the land or pass to the purchasers by a sale of the premises or property insured, and any assignment of the policy must be with the knowledge and consent of the insurer. (*Ayres v. Hartford Fire Ins. Co.*, 17 Ia., 183, and cases cited; *Simeral v. Dubuque Mutual Fire Ins. Co.*, 18 Ia., 319; *Etna Fire Ins. Co. v. Tyler*, 30 Am. Dec. [N. Y.], 90; May, Insurance, sec. 6.) The defendants not having received any assignment of the policy, acquired no rights to the proceeds thereof, and clearly were in no position to require an enforcement of the policy at the hands of the mortgagee, and were not damaged by his failure to give notice of the transfer to the insurance company and had no right to the relief prayed for in their answers.

It may be claimed that as they paid the premiums, they thereby acquired a right to the proceeds of the policy

and to its enforcement by the mortgagee; but on this point, if it would avail them anything, the evidence does not go far enough to show that the insurance company knew that the premium was paid by them. The evidence is conclusive that they paid the premium, but the nearest we can come to any knowledge of how it was paid, or to whom, is in the evidence of one Epperson, who was a clerk in the real estate office where the sale from the Kenneallys to the Gibsons was effected and closed, and who was the active party in said office in closing the sale and making the transfer. Said Epperson states on page 46, in answer to question No. 170, "Who paid the premium on the policy?" "Mr. Gibson; his money paid it. He sent the money by mail." The letter, if any, is not introduced, and there is no evidence as to whether the company was informed that Gibson paid it, or, if he did, whether he paid it for Kenneally or not, and whether it was paid as a part of the purchase price or not. As to these matters, we are left entirely in the dark and to conjecture, while on the other hand it is conceded that prior to this time the insurance was ordered by Kenneally and the policy issued to him, the mortgage clause attached, and the policy forwarded to the plaintiff; and it is not shown that the defendants, the Gibsons, ever made any effort in any manner to obtain possession of it, or have it assigned until after the property was destroyed by fire. There is nothing in the mere furnishing of the money to pay the premium upon which to found a claim to the proceeds, or the enforcement of the policy, or to obviate the necessity of an assignment of the policy.

The appellee has asked in its petition in the lower court that the deficiency judgment be accorded it against the defendants Gibson as to both mortgages, and in its brief in this court it asks that the decree of the lower court be so modified as to give it such relief, the lower court not having allowed it as against the defendants Gibson

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Stevenson v. Valentine.

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any judgment as to the second mortgage. The agreement of the Gibsons was that they assumed and agreed to pay the mortgage of \$1,200 and the interest thereon. In the absence of any testimony that the amount of the second mortgage was to cover any part of the \$1,200 note and mortgage, or any interest thereon, the finding and decree of the lower court was right and will not be modified or changed.

As the conclusion which we have reached as to the rights of the appellants fully disposes of them, the decision of the questions of what would have been their rights under the policy had they acquired any by proper assignment thereof, to have the notice of the transfer given by the mortgagee, and to recover damages if such notice was not given, is not necessary to a determination of the case as to them, and will not be discussed or decided. After thorough investigation of the record in the case, we are fully satisfied that the decree of the lower court was right, and it is

AFFIRMED.

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FANNIE C. STEVENSON, EXECUTRIX, v. E. K. VALENTINE, ADMINISTRATOR.

FILED JANUARY 16, 1894. No. 4809.

1. **Administration: FILING AND ALLOWANCE OF CLAIMS: LIMITATIONS.** An order of this court, which in the district court permitted the ascertainment of the amount of provable claims against the estate of a deceased person, did not excuse the filing and allowance of such claims in the county court of the proper county, wherein, by the provisions of the constitution and statutes of this state, the settlement of such estate was required to be made.
2. **———: PAYMENT OF UNALLOWED CLAIMS: STATUTE OF LIMITATIONS: PROVABLE CLAIMS.** At the date of first pleading

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his alleged right to reimbursement more than four years had elapsed since the claimant, as *administrator de son tort*, had voluntarily paid unallowed claims against a deceased person's estate. Whatever right to reimbursement he may have had was therefore fully barred by the statute of limitations when pleaded, and was not a provable claim against said estate.

3. A provable claim is one not barred by the statute of limitations, and to establish which there is competent evidence available.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

A former opinion in this case is reported in 27 Neb., 338.

*Uriah Bruner and M. McLaughlin*, for plaintiff in error.

*E. K. Valentine and J. C. Crawford*, *contra*.

RYAN, C.

The opinion of this court delivered by REESE, C. J., on the former hearing of this cause will be found on pages 338 *et seq.* of the 27th Nebraska.

Preliminary to a discussion of the matters involved in the present proceedings in error, the facts will probably be sufficiently presented by a quotation of the findings recited in the opinion of Chief Justice REESE. The material part of said findings is as follows:

"First. That the said B. M. Gay died intestate in Cuming county, Nebraska, on or about the 20th day of June, 1883, leaving an estate therein consisting of real and personal property, and also left surviving him a widow and three children living in the state of Connecticut, who are entitled to said property as the heirs of said Gay.

"Second. That in about the month of July, 1883, the said R. F. Stevenson was the attorney for one Angeline Bromley, who claimed the property as her own, took pos-

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session of, sold, and converted certain of the property of said estate of the value of \$4,055.

"Third. That said Stevenson was an attorney at law, and the only relation he sustained to said property was that of attorney for said Bromley, to whom he accounted for the same.

"Fourth. That the time he so acted for said Bromley the said Stevenson was advised of the fact that said Gay left surviving him the widow and children as aforesaid, and that they were entitled to the property of said estate.

"Fifth. That the said Valentine is the duly appointed and acting administrator of the estate of said Gay, and that Fannie C. Stevenson is the executrix of the estate of said Stevenson.

"And as a conclusion of law, that the acts of said Stevenson in taking possession of and selling said property made him a wrong-doer, and liable for the conversion of said property to the estate of Gay; and that the plaintiff is entitled to recover from the defendant the sum of \$4,055, together with interest from August, 1883, at the rate of seven per cent per annum.

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"It is therefore considered, ordered, and adjudged that the plaintiff have and recover of the defendant the said sum of \$5,316.53 damages so as aforesaid found due, to draw interest from this date. And plaintiff recover his costs."

The judgment above referred to was affirmed, but upon motion of the defendant, Mrs. Stevenson, executrix, the following order was made in this court:

"This cause came on to be heard upon the motion by the defendant to modify the order entered herein December 3, 1889, and was submitted to the court, on consideration whereof it is considered by the court that the cause be, and it hereby is, remanded to the district court with directions to permit plaintiff in error to amend her answer so as to set

out the actual debts of the estate of B. M. Gay, deceased, and which were provable against said estate and paid by R. F. Stevenson, if she so desires, and the question of the amount of such provable debts paid by him be ascertained by evidence, and any such amount so found due will be deducted from the amount heretofore ascertained as having been received by said Stevenson; the judgment of the district court as to the amount so received being hereby affirmed, and a proper judgment be entered for the amount due the defendant in error, and that the same be allowed against the estate of plaintiff in error and so certified to the county court."

One effect of this order was to recognize as a fixed quantity the amount due from the estate of R. F. Stevenson, by reason of the conversion by Mr. Stevenson of the assets of the estate of Dr. Gay. In the first trial no counter-claim or set-off had been pleaded on behalf of Mr. Stevenson's estate on account of the debts of the estate of Dr. Gay properly paid by him. Another effect of this order was to permit of the filing of said claim by way of a set-off, as though such filing had occurred previous to the original trial in the district court. On the 6th of March, 1890, there was accordingly filed on behalf of the defendant in this action, in the district court, an amended answer, in which there were pleaded by way of set-off forty-three different items in favor of the estate of R. F. Stevenson as against the estate of B. M. Gay. The aggregate amount of these set-offs, as given by the defendant in said answer, was \$2,625. None of these items was of date later than August 9, 1883, as stated in the defendant's answer filed March 6, 1890. There was, therefore, between the accruing of the last cause of action set out in defendant's answer by way of set-off, and its being first pleaded, a period of over six years. As there was no attempt to plead these matters of set-off until the date of the filing of the answer as authorized by this court, the commencement of suit in

respect to these items, as contemplated by the statute of limitations, must be construed as March 6, 1890,—a fact to be borne in mind in connection with such reference as shall hereafter be made to the statute of limitations.

The court instructed the jury to allow the defendant as set-off but the sum of \$255.90, which was accordingly done, as to which no complaint is made by defendant in error. The claims, by the instructions of the court withdrawn from the consideration of the jury, were without the support of any evidence under the rulings of the court, and this proceeding must be determined by the correctness of such rulings. In effect, the court held, as we understand the record, first, that it was necessary that the claims pleaded and offered to be proved should have been filed and passed upon in the county court; and, second, that whatever claim might otherwise have existed was barred by the statute of limitations. With such variations as the name of the holders of the claims, the amounts and dates of payment respectively rendered imperative, each of the forty-three counts of the defendant's answer was stated in the following language, used in setting out the first count, to-wit: "Said B. M. Gay, deceased, at the time of his death was justly indebted to the Consolidated Tank Line Company in the sum of \$40.74, which said sum the said R. F. Stevenson, deceased, paid said Tank Line Company on or about June 29, 1883." There was, of course, a general recitation in the answer of the indebtedness of Gay at the time of his death to a large number of persons, which the detailed statement above referred to immediately followed; the whole closing with the prayer that the amount of said claims, of the total of \$2,625, with interest from August 1, 1883, should be deducted from the amount of the value of said Gay's property which had been received by said R. F. Stevenson, and that said last named amount should be reduced accordingly. Parenthetically, it may be remarked that each of the allegations made in the answer

was denied; the plea of the statute of limitations was interposed, and the necessity for, as well as the lack of, filing the said several claims in the county court and the allowance of each as claims was set up; following which pleas the reply set forth that under the order of the county court the proof of claims against Gay's estate was required to be made within six months from March 6, 1886, and that none of the aforesaid claims had ever been filed or allowed in said county court. In proof of the respective items set forth in the answer of the defendant by way of set-off there was produced evidence simply of payments made by Mr. Stevenson to the holders of alleged claims against Dr. Gay's estate. It will scarcely escape notice that there was no proof, as there had been no pleading of the filing of any such claim or of action in respect thereto in the county court of Cuming county. By timely and proper objections these prerequisites were insisted upon, as well as was the lapse of time for presenting and proving claims.

The plaintiff in error appeals to the order of this court above recited as sufficient to avoid these objections. We do not so understand the scope and effect of the order invoked. Section 16, article 6, of the constitution of Nebraska provides that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law." These constitutional provisions are supplemented by section 3, chapter 20, Compiled Statutes, by which it is provided that "the courts of probate in their respective counties shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons," etc. This court could never have intended by its order to nullify these provisions of the constitution and statute of the state, as would the construction contended for by the plaintiff in

error. The order provided for the allowance by the district court of all "provable" claims. In the district court no claim against the estate of a deceased person is provable, originally, except upon appeal as to the same from the county court. The district court, by the statute and constitutional provisions cited, has no jurisdiction to administer the estate of a deceased person; that jurisdiction, by restrictive terms, is confined to the county court. No order of this court could operate to remove this restriction. Hence, as the construction which we now place upon this order in question is the only one which does no violence to the statute and constitution, it must be accepted as the only admissible construction. The ruling of the district court, whereby a claim was not deemed provable unless it had been duly filed in the county court and there properly allowed, was correct.

Equally effective was the statute of limitations to exclude from consideration the several claims urged, for more than four years had elapsed since the alleged payment of such claims by Mr. Stevenson before it was pleaded in the district court. In the trial of the cause, from the result of which the former error proceedings were taken, there was introduced in evidence a letter written by Mr. Stevenson to the pseudo Mrs. B. M. Gay (whose true name was Angeline Bromley). This letter was dated January 18, 1884, and recited the separate items for which Mr. Stevenson was debtor to the estate of B. M. Gay (known in Nebraska as "Gray"). Following this admission, Mr. Stevenson claimed credit in this letter for payment made by him to general creditors of Gay (*alias* Gray) in the sum of \$2,211.24, and for taxes paid of the amount of \$54.70; in all, \$2,265.94. The admission against his own interest was competent testimony as against Mr. Stevenson, or his estate, without doubt. We have been cited to no authority to sustain the present contention that the admission in his own favor is equally competent. If Mr. Stevenson him-

self was seeking the allowance of these credits, neither statute nor adjudication could be found to aid him; but how much more inadmissible becomes the proposed admission in his own favor as proof, ignoring as it does the existence and jurisdiction of the county court.

It is quite possible that the result reached may work great hardship to the estate of Mr. Stevenson. Doubtless, to avoid such a result, this court allowed the representative of said estate to plead and establish all "provable" claims against the estate of Dr. Gay, notwithstanding Mr. Stevenson had acted without authority in selling the property of Dr. Gay and with the proceeds of said sale discharging debts claimed to be due from Dr. Gay's estate. This was the extreme limit of the power of this court. Mr. Stevenson, when in his own wrong he assumed to dispose of the estate of Dr. Gay, rendered himself liable for the value thereof and all incidental damages, no matter what his motives may have been. Section 185 of chapter 23, Compiled Statutes, was then, as now, in force, and its provisions were as follows: "If any person or persons, before the granting of letters testamentary or of administration, shall convert to his or their own use, or shall embezzle, alienate, or destroy any of the moneys, goods, chattels, or effects of any deceased person, such person or persons shall stand chargeable and be liable to the executor or administrator of the estate of such deceased person for the value of the moneys, goods, chattels, or effects so converted, embezzled, alienated, or destroyed, and for all damages sustained, to be recovered by such executor or administrator, for the benefit of such estate, by a civil action in any court of competent jurisdiction," etc.

On the former hearing in this court, justice was so far tempered with mercy that the representative of the estate of Mr. Stevenson was permitted to plead matters of set-off omitted on the first hearing in the district court. Its own rules of practice and procedure it was competent for this

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court to modify, hold in abeyance, or wholly abrogate. It could not set aside constitutional or statutory provisions affecting and guarantying substantial rights. The trial had upon these new issues enabled the representative of the estate of Mr. Stevenson to establish as against the estate of Dr. Gay but \$255.70. As no error is apparent in the record of the trial leading to this result, it follows that the judgment of the district court is

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7. And in homicide cases the *corpus delicti* must be established beyond a reasonable doubt. *Id.*

**Criminal Law—concluded.**

8. The rule which requires proof beyond a reasonable doubt applies to misdemeanors. *Vandevanter v. State*..... 595
9. Proof that offense was committed on precise day named in information is not essential. *Palin v. State*..... 865
10. Where but a single crime is charged in information, and in order to prove it on the trial the state seeks to prove similar but distinct offenses, defendant should move to require prosecutor to elect. *Id.*.... 866
11. Instructions as to presumption of innocence approved. *Id.*.....867, 868
12. It is reversible error for trial judge to permit arguments to the jury in a criminal cause while he is absent from the court room. *Id.*.....867, 868
13. "Abuse" is synonymous with "ravish" in Crim. Code, sec. 12. *Id.*..... 867
14. Burden of proof never shifts in criminal prosecutions; state must disprove beyond a reasonable doubt, and not accused prove theory of self-defense. *Gravely v. State*...873-875

**Cross-Examination.**

- Wide latitude permissible in, of parties to alleged fraud.  
*Altschuler v. Coburn*..... 868

**Damages.** See GOOD-WILL. LANDLORD AND TENANT, 5.  
 LIQUORS, 1, 2. MUNICIPAL CORPORATIONS, 2, 4.

1. *Omaha & R. V. R. Co. v. Moschel*..... 281
2. An injured party must make reasonable efforts to render injury as light as possible. *Loomer v. Thomas*..... 280

**Damnum Absque Injuria.**

- Morrissey v. C., B. & Q. R. Co.*.....430, 431

**Death by Wrongful Act.** See LIQUORS, 1-3. NEGLIGENCE,  
 2, 9.

**Debtor and Creditor.** See ATTACHMENT. EXEMPTIONS.  
 FRAUDULENT CONVEYANCES.

**Decedents.** See ADMINISTRATION OF ESTATES. EVIDENCE, 8.**Decree.** See APPEAL, 5. REVIEW, 1, 2.**Dedication.** See HIGHWAYS, 1, 2.**Deeds.** See ESCROW, 1. EVIDENCE, 4. LAND CONTRACTS, 2.

**Default.** See BAIL, 6, 7. JUDGMENTS, 1, 2. JUSTICE OF THE  
 PEACE, 2.

**Definitions.** See WORDS AND PHRASES.

**Demurrer.** See PLEADING, 5.

**Depositions.** See EVIDENCE, 8.

**Deputies.** See COUNTY CLERK. SHERIFFS, 3.

**Description.** See EMINENT DOMAIN. MECHANICS' LIENS, 2.

**Dismissal.**

1. Motion for, in supreme court, on ground that order complained of was entered by consent, will not be entertained if notice was not served prior to expiration of time for serving briefs. *Omaha Fire Ins. Co. v. Maxwell*..... 359
2. Motion to dismiss appeal to supreme court on ground that appellant has accepted the fruits of the decree complained of, will be heard, though notice thereof was not served until after time for serving briefs, when it appears that appellee had no earlier knowledge of the grounds of the motion. *Harte v. Castetter*.....572, 573
3. For want of prosecution, in district court, should be vacated upon a showing that plaintiff's counsel was then engaged before another judge of the same court, had a meritorious defense, and was not negligent. *Lundgren v. Erik* ..... 363

**Divorce.** See HUSBAND AND WIFE, 2.

**Easements.** See ADVERSE POSSESSION, 8.

**Ejectment.** See GOVERNMENT LAND.

*Smith v. Hitchcock*..... 104

**Election of Counts.** See CRIMINAL LAW, 10.

**Embezzlement.** See BAIL, 3.

**Eminent Domain.** See CONSTITUTIONAL LAW, 4, 5.

Petition describing land by government subdivision will not authorize condemnation of platted city lot. *Omaha & B. V. B. Co. v. Rickards*..... 847

**Equity.** See SUBROGATION.

**Error Proceedings.** See APPEAL, 1, 3. JUDGMENTS, 3. STIPULATIONS.

1. Failure to file motion for new trial will not of itself warrant dismissal of petition in error, but where an inspection of the latter shows it to be without merit, the judgment will be affirmed. *Upton v. Cady*.....210, 211
2. A petition in error from justice's court must be incorporated into the record for the supreme court before latter will review judgment of district court thereon. *Lean v. Andrews*..... 658

**Error Proceedings—concluded.**

3. Are the proper remedy, and not *mandamus*, to correct error of justice of the peace in granting a new trial more than four days after judgment. *State v. Holmes*.....357, 358

**Error Without Prejudice. See HARMLESS ERROR.****Escrow.**

1. Finding of trial court that depositary of deed in, delivered it by authority, *held*, sustained by the evidence. *Eggleson v. Pollock*..... 190
2. Finding that depositary of mortgage delivered it without authority, *held*, to be sustained, and that neither mortgagee nor his assignee with notice acquired any rights thereby. *Roberson v. Reiter*.....199-209

**Estoppel. See ADVERSE POSSESSION, 5. RES ADJUDICATA.**

Cannot be grounded on silence unless there is both the specific opportunity and the apparent duty to speak; party omitting to speak must know that another is acting or about to act in reliance thereon. *Scharman v. Scharman*.....40, 50

**Evidence. See CRIMINAL LAW, 3-9. HUSBAND AND WIFE, 2. LANDLORD AND TENANT, 2. LIQUORS, 3, 9. NEGLIGENCE, 2. NEGOTIABLE INSTRUMENTS, 2. NEW TRIAL. PARTNERSHIP, 2. STATUTE OF FRAUDS, 1, 5. TRIAL, 2, 3.**

1. Rulings on admission of, approved. *Roberson v. Reiter*, 203, 204
2. Offer of proof is necessary in order to predicate error upon exclusion of answers to questions asked. *Smith v. Hitchcock*..... 110
3. Admission of incompetent, in trial to court, not reversible error. *Liverpool & London & Globe Ins. Co. v. Buckstaff*... 147
4. Record of a deed not admissible in, if acknowledged by grantees instead of grantors. *Maxwell v. Higgins* .....675, 676
5. Check containing memorandum of terms of contract is admissible for the purpose of showing the same. *Carstens v. McDonald*..... 860
6. Hearsay statements of decedents *held* inadmissible. *McConnell v. First Nat. Bank of Lincoln*..... 262
7. Where testimony tends to prove conspiracy to defraud creditors, declarations of one of the parties to it, in disparagement of his title, are admissible in action of replevin by him against sheriff. *Altschuler v. Coburn*..... 889
8. The introduction by defendants of their decedent's deposition, merely for the purpose of rebutting plaintiff's

**Evidence—concluded.**

- claim that the subject-matter of the pending action was not identical with a former one, will not, under Code, sec. 329, authorize the admission of testimony as to transactions and conversations with such decedent relative to other matters material to the pending cause. *Furbush v. Barker*.....1, 26, 27
9. Court may permit leading questions to be asked of a paralytic who can answer only in monosyllables. *Belknap v. Stewart*..... 310
10. Record of divorce proceedings not admissible in action against a husband for board and lodging furnished to his wife while living apart from him without justification. *Id.*.....307-309
11. Rulings on, in action against contractors who had promised to pay for material furnished a subcontractor. *Bar-ras v. Pomeroy Coal Co.*..... 311

**Executions.** See JUSTICE OF THE PEACE, 2. LAND CON-TRACTS, 4.

**Executors.** See ADMINISTRATION OF ESTATES.

**Exemptions.**

1. Debtor's inventory, set out in opinion, *held* sufficient though informal. *Farquhar v. Hibben*.....558-561
2. The "pair of horses" exempted by sec. 530 of the Code is not necessarily a working team; the selection is left to the debtor. *Conway v. Roberts*..... 458

**Fees.** See SHERIFFS, 2, 3.

**Fellow-Servants.** See MASTER AND SERVANT, 3.

**Felony.** See CRIMINAL LAW, 6.

**Fences.** See NEGLIGENCE, 3.

**Final Order.**

Vacating judgment and permitting answer at same term is not. *Roh v. Vitera*..... 338

**Findings.** See REVIEW, 2, 3, 11, 15, 16.

**Fire Insurance.** See INSURANCE, 1-5.

**Foreclosure.** See HOMESTEADS. LAND CONTRACTS, 2-4. MORTGAGES. TAX LIENS.

**Forfeiture.** See BAIL, 6, 7.

**Fraud.** See RESCISSION. VENDOR AND VENDEE.

**Fraudulent Conveyances. See CONSIDERATION.**

1. Verdict of jury supported by competent evidence is conclusive as to fraudulent intent. *Schrider v. Tighe*..... 394
2. Intention to defraud cannot be inferred from mere fact of preferring creditors. *Farwell v. Wright*..... 451
3. Rulings and instructions in attachment and replevin held to have restricted too much province of jury. *Karll v. Kuhn* ..... 539

**Garnishment. See SHERIFFS, 4.**

1. Stipulation that garnishee should be discharged upon "showing fully" the amount in his hands, is no defense to an action under Code, sec. 225, for unsatisfactory disclosure and conversion. *Lau v. Grimes Dry Goods Co*..... 224
2. Rulings of trial court in such action held to be harmless error, and evidence of value of goods sufficient to sustain judgment. *Id.*..... 223, 224
3. Garnishee must answer unequivocally, and if he fail to obey orders of court he acts at his peril. *Work v. Brown*... 498

**General Denial. See PLEADING, 5.****Good-Will.**

One who sells his business and good-will to another, agreeing not to do business at the same point, and afterwards violates such agreement, is liable in damages. *Nelson v. Hiatt*..... 478

**Government Land. See TAXATION, 1, 4.**

Holder of receiver's certificate cannot, when entry has been canceled (though without authority) and no patent has been issued, maintain ejectment. *Headley v. Cuffman*, 68, 74, 75

**Guaranty. See NEGOTIABLE INSTRUMENTS, 6.****Habeas Corpus. See BAIL, 5.****Harmless Error. See INSTRUCTIONS, 2, 3, 6.**

1. *Altschuler v. Coburn* ..... 888
2. *Lau v. Grimes Dry Goods Co*..... 223

**Highways.**

1. *Animus dedicendi* must be clearly proved before highway may be claimed by dedication. *Brown v. Stein*..... 599
2. Evidence held insufficient to establish dedication. *Id.*
3. Secs. 47-52, ch. 78, Comp. Stats., providing for the establishment of private roads, are unconstitutional. *Welton v. Dickson*..... 767

**Homesteads. See EXEMPTIONS.**

Under sec. 17, ch. 36, Comp. Stats., surviving husband or wife may mortgage life estate in, and the same will pass to purchaser at foreclosure sale. *Nebraska Loan & Trust Co. v. Smassall*..... 519

**Homicide. See CRIMINAL LAW, 7.**

**Horses. See EXEMPTIONS. MASTER AND SERVANT.**

**Husband and Wife. See HOMESTEADS. MARRIED WOMEN.**

1. Husband not impliedly responsible to a third party for board and lodging of a wife living apart from him without justification or permission. *Belknap v. Stewart*..... 310
2. Record of divorce proceedings not admissible in action by such third party against husband, to show wife's justification. *Id*.....307-309
3. Wife may recover from husband for his use and occupation of her premises, though without an express contract, but she cannot testify in such action. *Skinner v. Skinner*, 756

**Identity of Issues. See APPEAL, 4.**

**Illegitimate Children. See BASTARDY.**

**Impeachment.**

*Furbush v. Barker*..... 27, 28

**Improvements. See TAXATION, 1, 2.**

**Indictments. See INFORMATION AND INDICTMENTS.**

**Indorsements. See NEGOTIABLE INSTRUMENTS, 1, 4, 6.**

**Informations and Indictments. See CRIMINAL LAW, 10.**

1. When charging unlawful transfer of mortgaged personalty, must allege name of transferee and that transfer was without written consent of owner and holder of debt. *State v. Hughes*.....368, 369
2. Not a fatal defect that offense is charged with unnecessary particularity; surplusage may be stricken out. *State v. Kendall* .....817, 819, 820
3. Sufficiency of, in prosecution for maintaining dam injurious to public health. *Id*..... 818, 819
4. When apparently defective, court should inquire whether there is probable cause for prosecution and hold or discharge accused accordingly. *Id*.....821, 822

**Injunctions.**

1. Remedies at law must be plain and adequate, which will prevent resort to. *Welton v. Dickson*.....781, 782

**Injunctions—concluded.**

2. Petition for, to prevent enforcement of judgment rendered by default must aver facts from which it appears that plaintiff had a meritorious defense, and that his failure to plead it and to avail himself of appellate and other remedies was not due to neglect. *Langley v. Ashe*.....55, 56

**Instructions.**

1. Erroneous, if they assume existence of a material fact concerning which evidence is conflicting. *Chicago, B. & Q. R. Co. v. Anderson*.....116, 117
2. Error in, is not cured by the fact that the general tenor of the charge is more favorable to the defeated party. *Id*... 117
3. Conflicting charges, one of which misstates the law to the prejudice of the successful party, cannot be availed of as error by the defeated one. *Farwell v. Cramer*.....62, 67
4. Need not be given upon uncontroverted points or in the exact language asked. *Lau v. Grimes Dry Goods Co*...216, 222
5. Refusal of, when applicable to the issues and not otherwise supplied, is reversible error. *Powder River Live Stock Co. v. Lamb*..... 354
6. Giving an erroneous instruction, or a second instruction on the same point, is not reversible error unless the jury is misled thereby. *Carstens v. McDonald*.....861, 862

**Insurance. See MORTGAGES, 1.**

1. Oral agreements of attorneys to arbitrate loss will not be enforced against objections of one even though policy provide for arbitration. *German-American Ins. Co. v. Buckstaff*.....140-143
2. Vacancy and non-occupancy of a building are questions for the jury under proper instructions. *Id*..... 144
3. A building whose tenant has removed, leaving a portion of his effects therein, is not "vacant or unoccupied." *Liverpool & London & Globe Ins. Co. v. Buckstaff*.....148, 149
4. A clause requiring actions to be "commenced six months after the occurrence of the fire," construed with another providing for payment sixty days after receipt of proofs of loss, and held to authorize commencement of suit within six months after the sixty days. *Fireman's Fund Ins. Co. v. Buckstaff*.....151, 152
5. Against fire is a personal contract, and does not run with the land. *New England Loan & Trust Co. v. Kenneally*.... 900
6. Written contract of, conclusively presumed to contain all

**Insurance—concluded.**

agreements of the parties. *McLaughlin v. Equitable Life Assurance Society*..... 733

7. In a life policy providing for issue of paid-up insurance upon surrender of old policy within six months after default, time is of the essence, and where there is no surrender for more than eleven months beneficiary cannot compel specific performance though three annual premiums had been paid. *Id*.....734, 735

**Interstate Commerce.** See CARRIERS.

**Intoxicating Liquors.** See LIQUORS.

**Inventory.** See EXEMPTIONS.

**Jailers.** See SHERIFFS, 2.

**Joint Tenancies.**

Are not favored, and conveyance to more than one will be presumed to create a tenancy in common. *Maxwell v. Higgins* ..... 676

**Journal Entries.**

By clerk of district court are conclusive on review; if incorrect, should be remedied by order of district court. *Chicago, B. & Q. R. Co. v. Anderson*..... 112

**Judgments.** See JUSTICE OF THE PEACE, 2. REPLEVIN.  
SUBROGATION. VOLUNTARY PAYMENT.

1. Order vacating judgment by default and permitting answer at same term not a final order. *Roh v. Vitera*..... 338
2. Motion to vacate, should assign grounds, but if these are set forth in a separate paper, and acted upon by the trial court without objection as to form, supreme court will not consider it. *Id*..... 337
3. When rendered against surety on appeal bond, only the surety can complain, and such judgment does not bar error proceedings against principal defendant. *Habig v. Layne*.....747, 748
4. Cannot be vacated by district court after term except for grounds enumerated in Code, sec. 602. *McBrien v. Riley*, 563, 564
5. Hence the fact that one against whom judgment was rendered by default was not notified of appeal of the case from justice's court is not sufficient ground for vacating it. *Id*..... 564
6. A motion to vacate judgment by default must be accompanied by answer setting up meritorious defense. *Id*.

**Judicial Sales. See ATTORNEYS.**

Fraud alone in appraisement, and not mere error of judgment, will authorize vacation of; objections to appraisement and motion to vacate should be made and filed before sale. *Vought v. Foxworthy*.....793, 794

**Jurisdiction. See ACTIONS, 1-4, 7, 8. ADMINISTRATION OF ESTATES, 3. CARRIERS. MANDAMUS, 1.**

**Jury. See FRAUDULENT CONVEYANCES, 3. NEGLIGENCE, 3. QUESTIONS OF FACT.**

**Justice of the Peace. See ERROR PROCEEDINGS, 3. MALICIOUS PROSECUTION.**

1. Notice of appeal from, by appellant to appellee, is not necessary. *McBrien v. Riley*..... 564
2. Order of continuance by, two days before summons is returnable, with the consent of one defendant but without the knowledge of the other, is, as to the latter, voidable only; and where judgment is rendered against him by default at the adjourned date, a petition to enjoin its execution, which merely states that he had a good defense without setting it forth, and which does not state why he failed to appear or appeal, is insufficient. *Langley v. Ashe*..... 54

**Land Contracts.**

1. May be shown by parol to be securities in the nature of mortgages, even though formally and absolutely assigned in writing, upon payment of debt, or lien of assignee ceases. *Scharman v. Scharman*..... 39, 45
2. In action by vendor to foreclose contract of purchase or bond for deed on account of vendee's default, plaintiff need not prove a tender of deed; at most this could only affect the matter of costs. *Harrington v. Birdsall*.....182-184
3. Strict foreclosure decreed where vendee had paid but one-tenth of the purchase price and was in default more than fifteen months without showing excuse, or that the land had increased in value; or was worth more than purchase price. *Id.*..... 187
4. Stay of execution not allowed in strict foreclosure. *Id.*.....187, 198

**Landlord and Tenant. See AGENCY, 1. JOINT TENANCIES. MECHANICS' LIENS, 9.**

1. In absence of contract to repair, tenant takes premises as they are, and cannot recover for repairs made. *Powell v. Beckley*.....157, 161
2. Relation of, implied between parties, by the beneficial use

**Landlord and Tenant—concluded.**

and occupation on the part of one of the other's land with owner's knowledge. *Skinner v. Skinner*..... 756

3. In an action between lessor and lessee's assignee, where description in lease is uncertain, parol evidence is admissible to show that at the time it was made the parties to the lease went upon the land and agreed upon certain boundaries. *Schneider v. Patterson*.....684, 685
4. It is no defense to an action by such assignee for damages for exclusion from the land that he knew of his assignor's exclusion and the lease to another. *Id.*.....685, 686
5. Measure of damages for exclusion from land leased for mining sand is value of occupancy for that purpose, and evidence thereof is admissible. *Id.*..... 686

**Larceny.** See CRIMINAL LAW, 4.

**Leading Questions.** See EVIDENCE, 9.

**Leases.** See LANDLORD AND TENANT. TAXATION, 2.

**License.** See LIQUORS, 4-9.

**Life Estates.** See HOMESTEADS.

**Life Insurance.** See INSURANCE, 6, 7.

**Limitation of Actions.** See ADMINISTRATION OF ESTATES,

5. INSURANCE, 4. TAX LIENS.

- Action for damage to land by construction of railroad near it, is barred in four years from such construction. *Omaha & R. V. R. Co. v. Moschel*.....287, 288
- Morrissey v. Chicago, B. & Q. R. Co.*..... 415

**Liquors.**

1. It is not a fact mitigating damages in action against saloon-keeper for death of a father caused by, that deceased had accumulated property which plaintiffs acquired. *Houston v. Gran*.....690, 691
2. Nor is a child precluded from recovering in such action to the extent that he has supported himself in the past. *Id.*
3. Evidence that the saloon-keeper had instructed his servants not to sell to the deceased is inadmissible. *Id.*..... 691
4. Publication of statutory notice is a jurisdictional prerequisite to issue of license. *Rosewater v. Pinzensham*..... 838
5. Affidavit of publisher that notice was published in newspaper having largest circulation in county, is *prima facie* evidence thereof, but may be impeached. *Id.*..... 839
6. Considerations in determining proper newspaper. *Id.*..... 844

**Liquors—concluded.**

7. Whether separate editions of a daily paper are distinct publications, is a question of fact for the license board. *Id.*, 845
8. Where such editions are not substantially the same, insertion in but one is sufficient if its circulation is the largest in the county. *Id.*..... 846
9. License board has no power to designate newspaper, but on hearing remonstrance may compel production of instruments and commit for contempt those refusing to testify. *Id.*.....836, 843, 844

**Locus.** See ACTIONS, 1-4, 7, 8.

**Malicious Prosecution.**

1. Action for, against justice of the peace, constable, and prosecuting witness, is properly brought in the county where plaintiff was arrested, though subsequent proceedings were all in another county. *Vennum v. Huston*....299, 300
2. Justice of the peace is not liable for issuing a warrant, if he acts in good faith, has jurisdiction, and the complaint, though informal, is not void. *Id.*..... 302
3. Prosecuting witness not liable unless inspired by malice and without probable cause. *Id.*..... 303

**Mandamus.**

1. Application for, to enforce private rights, should be made first to the district court, not the supreme court. *State v. Lincoln Gas Co.*..... 33  
*State v. School District*..... 237  
*State v. Merrill* ..... 511
2. Not the proper remedy to correct error of justice of the peace in granting new trial more than four days after judgment. *State v. Holmes*.....357, 358

**Manslaughter.** See CRIMINAL LAW, 7.

**Married Women.** See HUSBAND AND WIFE.

1. Property rights, same as *feme sole*. *Farwell v. Cramer*..... 61
2. No presumption that personalty in possession of wife living with her husband belongs to latter. *Id.*.....66, 67
3. Common law disability remains except as removed by statute. *Godfrey v. Megahan*..... 751
4. Whether contracts of, are made with reference to separate estate is a question of fact. *Id.*..... 752

**Master and Servant.** See LIQUORS, 3. PLEADING, 6.

1. Master's duty to provide for use by servant is the same in respect to animals as in case of machinery. *Hammond v. Johnson*.....248, 249

**Master and Servant—concluded.**

2. Master, even though a corporation, is liable for injuries to servants from instruments which it might have known were unsafe. *Id.*.....249, 250
3. Evidence held to show that party directing the use of a vicious horse by servant was a vice-principal and not a fellow-servant. *Id.*..... 251

**Maxims.**

- "He who seeks equity must do equity" discussed. *Alexander v. Shaffer* ..... 816

**Measure of Damages. See LANDLORD AND TENANT, 5.**

- Lyman v. City of Lincoln*..... 803

**Mechanics' Liens.**

1. Cannot ordinarily take precedence over prior recorded mortgage. *Holmes v. Hutchins*.....610-612
2. No lien attaches against purchasers where sworn statement contains a misdescription of premises. *Id.*.....617, 618
3. Mere knowledge by the vendor of a lot, of proposed building thereon by the vendee, will not subject the former's mortgage lien for purchase money to the material-man's lien. *Id.*.....602, 619
4. Vendor's lien is subject to, where, by agreement with vendee, latter is constituted agent of vendor in erecting a building on the premises; and such agreement may be established by parol. *Sheehy v. Fulton*.....693-696
5. Lien of material-men and laborers contributing to the construction of a railroad held superior to a mortgage on the railroad executed before such construction was begun. *Kilpatrick v. Kansas City & B. R. Co.*..... 620
6. Such lien is not waived by merely taking collateral security from another, in a manner not inconsistent with retention of lien. *Id.*.....640, 641
7. Do not attach merely by virtue of delivering material to son of contractor not shown to be acting or claiming to act for him. *Weir v. Barnes*.....877, 878
8. Filing of lien within statutory limit is imperative. *Id.*... 878
9. Cannot attach by virtue of contract with mere tenant of premises. *Waterman v. Stout*..... 396
10. Material-man is charged with notice of interest held by party with whom he deals. *Id.*
11. Attach for lumber delivered at another place than where building is being erected but used in its construction as was intended; and such lien dates probably from final delivery at building. *Budger Lumber Co. v. Mayes*.....827-830

**Mill-Dams.**

Are unlawful if they render a stream stagnant and it becomes injurious to public health and safety. *State v. Kendall*.... 820

**Misconduct.** See TRIAL, 4.**Misdemeanors.** See CRIMINAL LAW, 8.**Mortgages.** See CHATTEL MORTGAGES. ESCROW, 2. HOMESTEADS. INFORMATIONS AND INDICTMENTS, 1. LAND CONTRACTS, 1. MECHANICS' LIENS, 1, 5, 6.

1. Where a fire insurance policy on mortgaged premises, payable to the mortgagee, is forfeited through his fault, a purchaser subject to the mortgage to whom the policy was not assigned cannot set off its amount against foreclosure. *New England Loan & Trust Co. v. Kenneally*..... 895
2. Purchaser assuming first mortgage does not thereby become liable for a second. *Id.*.....901, 902

**Motions.** See JUDICIAL SALES. PLEADING, 4.**Municipal Corporations.**

1. Charter provision requiring statement of claims against city for unliquidated damages to be filed with city clerk within three months after cause of action accrues, is constitutional and a condition precedent to suit. *City of Lincoln v. Grant*.....372-374
2. Evidence held to show that damages to property from change of street grade exceeded special benefits. *Stanson v. City of Omaha*..... 550
3. In cities of first class over 10,000 in counties under township organization, town board equalizes taxes and may employ a clerk. *Bittenhouse v. Bigelow*..... 543
4. Award of damages to property from construction of viaduct held insufficient. *Stanwood v. City of Omaha*..... 552

**Murder.** See CRIMINAL LAW, 7.**Names.** See ACTIONS, 6. AMENDMENT, 3.**Negligence.** See DAMAGES. MASTER AND SERVANT. PLEADING, 6.

1. *Chicago, B. & Q. R. Co. v. Anderson*..... 112
2. In an action against a railroad company for killing a boy on its track, evidence of the engineer's neglect to keep a lookout ahead is inadmissible where petition does not allege the same, and a verdict founded on such evidence will be reversed. *Chicago, B. & Q. R. Co. v. Grablin*.....96-99
3. Failure of company to fence its tracks as required by statute is. *Id.*..... 99

**Negligence—concluded.**

4. In determining whether the deceased was guilty of contributory negligence in trespassing on the track, it was proper for the jury to consider his age and discretion. *Id.*, 99, 100
5. The fact that a train is not on schedule time is not. *Id.*... 98
6. Outside of cities, speed of train is not, *per se.* *Id.*, 91, 98, 99
7. Failure to use air-brake on trains may be. *Id.*..... 98
8. Failure of engineer to keep a lookout ahead is, though deceased was a trespasser. *Id.*.....101, 102
9. Action against employer for death from defective appliances; rulings and instructions approved; judgment for plaintiff affirmed. *Union Stock Yards Co. v. Conoyer* ..... 488  
*Union Stock Yards Co. v. Larson*..... 492
10. Is a question of fact. *Union P. R. Co. v. Porter*..... 233
11. Instructions in actions by passenger against railroad company, for personal injuries, approved. *Id.*.....235, 237

**Negotiable Instruments.**

1. Assignee after maturity takes subject to all defenses between the parties. *Roberson v. Reiter* ..... 204
2. Instruction that giving of note at settlement is *prima facie* evidence that all matters then pending between the parties were settled, approved. *Wagner v. Ladd*..... 163
3. Action on note; defense, failure of consideration; finding and instructions approved. *Richardson v. Winter*..... 288
4. The guarantor of a note who has paid part of it, may recover such payment from the sureties thereon, though the latter were also stay sureties on a judgment against the maker, to the discharge of which such guarantor, at the maker's request, had applied the amount loaned on the note, and thus made paramount a lien of his own. *Lichty v. Moore*.....274, 275
5. Nor is it a defense to such an action that the original payee, as assignee of the maker, has wasted the latter's estate so that he cannot pay. *Id.*..... 273
6. Blank indorsement may, as between original parties, be modified by parol. *Holmes v. First Nat. Bank of Lincoln*, 330-332

**New Trial. See MANDAMUS, 2.**

Newly discovered evidence to authorize, must be such as was not, with diligence, procurable at first trial, and would change the result thereof. *Smith v. Hitchcock*..... 110

**Notes and Bills. See NEGOTIABLE INSTRUMENTS.**

- Notice.** See ADVERSE POSSESSION, 2, 3. CHATTEL MORTGAGES, 2. DISMISSAL, 1, 2. JUSTICE OF THE PEACE, 1. LIQUORS, 4-9. MECHANICS' LIENS, 3, 10. VENDOR AND VENDEE.
- Nuisances.** See MILL-DAMS.  
*Omaha & R. V. R. Co. v. Moschel* ..... 281
- Oath.** See ARBITRATION AND AWARD, 3.
- Occupancy.** See ADVERSE POSSESSION. INSURANCE, 2, 3.
- Officers.** See COUNTY CLERK. COUNTY TREASURER. MUNICIPAL CORPORATIONS, 3. REGISTER OF DEEDS. SHERIFFS.
- Official Bonds.** See ACTIONS, 3, 4.
- Onus Probandi.** See CRIMINAL LAW, 14. PLEADING, 3.  
 Not error to instruct that plaintiff must make out his case by  
 "a fair preponderance of the evidence." *Altshuler v. Ceburn* ..... 889, 890
- Overruled Cases.** See TABLE, *ante*, xxiii.
- Paid-Up Insurance.** See INSURANCE, 6, 7.
- Parol Evidence.** See LANDLORD AND TENANT, 3. PARTNERSHIP, 2. STATUTE OF FRAUDS, 5.
- Parties.** See AMENDMENT, 3. BUILDING CONTRACTS, 2.  
 Roman Catholic bishop the proper plaintiff in action on a church subscription. *Egan v. Bonacum* ..... 577
- Partnership.**
1. Purchase of material by one member of a firm of contractors, under a written contract in his own name, though with no understanding that it was on his individual account, binds the firm. *Habig v. Layne* ..... 743
  2. Secs. 27-29, ch. 65, Comp. Stats., requiring certificate of, to be recorded, do not prohibit conduct of partnerships without such certificate, nor exclude parol evidence of their existence. *Schneider v. Patterson* ..... 680
- Patents.** See TAXATION, 4. GOVERNMENT LAND.
- Personal Injuries.** See MASTER AND SERVANT. NEGLIGENCE.
- Pleading.** See ACTIONS, 6. APPEAL, 4. ARBITRATION AND AWARD, 5. BUILDING CONTRACTS, 3. INFORMATIONS AND INDICTMENTS, 1, 2. INJUNCTION, 2. NEGLIGENCE, 1.
1. Facts, and not conclusions in, will be considered. *Spargur v. Romine* ..... 736, 741

**Pleading—concluded.**

2. Allegations of petition, not specifically denied in answer, will be taken as admitted. *Maxwell v. Higgins* ..... 676
3. In submissions on pleadings moving party must make out his case from pleadings alone; question is not as to burden of proof, but who, from the disclosed facts, is entitled to judgment. *State v. Lincoln Gas Co.*.....33, 39
4. Sustaining a motion to strike from an answer a portion of the defense which consisted of a series of acts constituting one transaction is reversible error. *Hovland v. Burrows* .....130, 131
5. In an action on a contract governed by that section of the statute of frauds which requires acceptance, a petition which merely alleges delivery is demurrable, and the defect is not waived by answering to the merits but is raised by a general denial. *Powder River Live Stock Co. v. Lamb* .....348-351
6. In action against employer for death of servants from defective appliances, latter's want of knowledge of the defect need not be averred in the petition. *Union Stock Yards Co. v. Conoyer*.....490, 491

**Possession.** See ADVERSE POSSESSION.

**Practice.** See APPEAL. DISMISSAL. ERROR PROCEEDINGS. MANDAMUS, 1. PLEADING. REPLEVIN. REVIEW. TRIAL.

**Prescription.** See ADVERSE POSSESSION.

**Presumption.** See BAIL, 4. INSURANCE, 6. JOINT TENANCIES. MARRIED WOMEN, 2. REVIEW, 16. WATERS, 4. *Skinner v. Skinner* ..... 756

**Principal and Agent.** See AGENCY. CORPORATIONS. LIQUORS, 3. MECHANICS' LIENS, 7.

**Principal and Surety.** See NEGOTIABLE INSTRUMENTS, 4. SURETYSHIP.

**Production of Instruments.** See LIQUORS, 9.

**Public Health.** See MILL-DAMS.

**Public Lands.** See GOVERNMENT LAND.

**Publication.** See LIQUORS, 4-9.

**Quantum Meruit.** See BUILDING CONTRACTS, 4.

There can be no recovery on, by one who pleads and relies on a special contract. *Powder River Live Stock Co. v. Lamb*... 354

**Questions of Fact.**

1. Whether speed of train constitutes negligence is. *Chicago, B. & Q. R. Co. v. Grablin*.....91, 98, 99
2. And in general negligence is. *Union P. R. Co. v. Porter*... 233
3. Whether building is "vacant or unoccupied" is. *German-American Ins. Co. v. Buckstaff* ..... 144
4. Fraudulent intent in conveyances is. *Shrider v. Tighe*.... 394  
*Farwell v. Wright*..... 445
5. Whether contract of married woman is made with reference to separate estate is. *Godfrey v. Megahan*..... 751
6. Whether separate editions of a daily paper are distinct publications is. *Rosewater v. Pinzenscham*..... 845
7. Need not be decided by the jury upon a mere count of witnesses; they are judges of the weight of each witness' testimony, and unless clearly wrong their estimate will not be disturbed on review. *Howell Lumber Co. v. Campbell* ..... 567  
*Habig v. Layne*..... 743

**Questions of Law.**

- Interpretation of insurance policy is. *German-American Ins. Co. v. Buckstaff* ..... 144

**Quorum.** See COUNTY TREASURER, 4.

**Quo Warranto.**

- Information in, against railroad corporation for illegal use of franchise, dismissed upon approval of adverse report of referee upon the facts. *State v. Atchison & N. R. Co.*..... 437

**Railroads.** See CARRIERS. DAMAGES, 1. MECHANICS' LIENS, 5, 6. NEGLIGENCE, 2-8, 10, 11. QUO WARRANTO. WATERS, 3.

**Rape.**

- The word "abuse" in sec. 12 of Crim. Code is synonymous with "ravish." *Palin v. State*..... 867

**Ratification.** See AGENCY, 2.

**Real Estate.** See ADVERSE POSSESSION. BOUNDARIES. GOVERNMENT LAND. JOINT TENANCIES. LAND CONTRACTS. VENDOR AND VENDEE.

**Real Estate Agents.**

- Action for commissions; judgment for plaintiff affirmed. *Mills v. Leavitt*..... 580

**Reasonable Doubt.** See CRIMINAL LAW, 6-8, 14.

**Recognizance.** See BAIL, 6, 7.

**Record.** See CHATTEL MORTGAGES, 2. REVIEW, 8, 12.

**Register of Deeds.**

Counties having less than 18,003 inhabitants by last national census cannot elect, though prior state census shows that number. *State v. Lewis*.....193, 194

**Religious Societies.** See PARTIES.

**Remedies.** See ACTIONS, 5. INJUNCTION, 1.

**Removal of Officers.** See COUNTY TREASURER, 2-5.

**Replevin.** See EVIDENCE, 7.

1. Will not lie against one not in possession or control of property unless he has concealed, removed, or disposed of the same in order to avoid the writ; but such a defendant is not entitled to judgment for return of property. *Depriest v. McKinstry*.....196, 197
2. Judgment in, should be in alternative, for property or its value; but if not so, case will simply be remanded to trial court for proper judgment. *Roberson v. Reiter*.....205, 206

**Reputation.**

*Furbush v. Barker*.....27, 28

**Res Adjudicata.**

1. Party asserting, must show that former judgment was conclusive in his favor. *Spargur v. Romine*..... 742
2. A former adjudication in the federal court will not be noticed in the state court unless properly presented by pleadings and evidence. *Kilpatrick v. Kansas City & B. R. Co.*, 620, 647

**Rescission.**

Decree setting aside conveyance of land for notes proving to be worthless, affirmed. *Wagner v. Lewis*..... 325

**Review.** See ADMINISTRATION OF ESTATES, 2. APPEAL. ERROR. PROCEEDINGS. BAIL, 2. CERTIORARI. DISMISSAL, 1, 2. NEGLIGENCE, 2, 11. QUESTIONS OF FACT, 7. REPLEVIN, 2.

1. *Richardson v. Winter*..... 288
2. Findings foreign to the issues will be disregarded by the appellate court, and if essential to the decree the latter will be set aside. *Furbush v. Barker* ..... 1
3. Decree upon findings unsustained by the evidence will be set aside and one directed entered which the facts will justify. *Id.*
4. Conflicting evidence. *Cunningham v. Katz*..... 29
5. Alleged errors will not be considered unless argued specifically in briefs. *Brown v. Dunn*..... 52

**Review—concluded.**

6. Assignment in petition in error that the court erred in excluding evidence sought to be introduced "according to the offer made by defendants in the record" is too general. *Farwell v. Cramer*..... 67
7. A decree granting appellant the relief sought by him below will be affirmed regardless of its merits. *Hoops v. McNichols*..... 76
8. Supreme court will not substitute, for the certified copy of the journal entry in the transcript, another paper certified to be a memorandum of such journal entry prepared by the trial judge. *Chicago, B. & Q. R. Co. v. Anderson*..... 112
9. Admission of incompetent testimony in trial to court not ground for reversal. *Liverpool & London & Globe Ins. Co. v. Buckstaff*..... 147
10. An order entered by consent of parties will not be reviewed by supreme court. *Omaha Fire Ins. Co. v. Maxwell*.....360, 361
11. Special finding requested by one party but made in favor of the other; evidence conflicting; finding sustained. *McConnell v. First Nat. Bank of Lincoln*.....261-263
12. Where the copy of an affidavit appearing in the transcript differs from that in the bill of exceptions, only the latter will be considered. *Lundgren v. Erik*..... 365
13. Unless exceptions were taken to amendments and objections made to allowance of amendments, rulings of trial court on neither point will be reviewed. *Levi v. Fred*, 566, 567
14. Judgment found to conform to pleadings and evidence; affirmed as of course, no brief having been filed. *Damon v. City of Omaha*..... 583
15. Decree on appeal will be affirmed unless it and the findings are irreconcilable with any view of the testimony. *Swartz v. Duncan*..... 785
16. Evidence will be presumed to sustain findings where bill of exceptions is so poorly prepared as to prevent an intelligent examination. *Badger Lumber Co. v. Mayes*.....826, 827

**Roads.** See HIGHWAYS.

**Sales.** See INFORMATIONS AND INDICTMENTS, 1. JUDICIAL SALES.

**School Lands.** See TAXATION, 2.

**Scienter.** See LIQUORS, 3.

**Self-Defense.** See CRIMINAL LAW, 14.

**Settlement.** See NEGOTIABLE INSTRUMENTS, 2.

Evidence *held* not to show unfair means in obtaining. *Swartz v. Duncan*.....787, 788

**Sheriffs.**

1. Not entitled to salaries from county for themselves or deputies as jailer, but only to compensation for board and care of prisoners. *Kyd v. Gage County*..... 134
2. But are entitled to fees as jail guard. *Gage County v. Kyd*, 164
3. Deputy of, cannot collect salary from county. *Gage County v. Wilson*..... 169
4. Not a sufficient cause of action on bond of, that sheriff served notices of garnishment in his own case before serving those previously left with him by plaintiff. *Aultman v. Grimes*.....880, 881
5. Wrongful seizure of property. *Russell v. Gillespie*.....459, 461

**Special Findings.** See REVIEW, 11.

**Specific Performance.** See INSURANCE, 7.

**State Treasurer.** See ACTIONS, 3, 4. CONVERSION.

**Statute of Frauds.**

1. Evidence found to show an original verbal promise to pay for materials furnished another. *Barras v. Pomeroy Coal Co*..... 314  
*Sheehy v. Fulton*..... 697
2. A contract is not within sec. 8 of ch. 32, Comp. Stats., where performance within one year is possible. *Powder River Live Stock Co. v. Lamb*.....347, 348
3. Under sec. 9 of the same chapter, actual acceptance by the vendee is necessary; mere delivery by vendor is insufficient. *Id*.....348-350
4. Memorandum executed after sale, in pursuance of verbal promise before sale, is sufficient and requires no new consideration. *Sheehy v. Fulton*.....692, 697
5. While separate parts of a correspondence are sufficient to constitute the memorandum required by, the connection of these parts must be apparent and cannot be established by parol. *Fowler Elevator Co. v. Cottrell* .....514-16

**Statute of Limitations.** See LIMITATION OF ACTIONS.

**Statutes.** See CONSTITUTIONAL LAW. TABLE, *ante*, p. xlv.

1. Ch. 50, Laws of 1891, is constitutional, and did not repeal art. 2, ch. 18, Comp. Stats. *Hopkins v. Scott*.....667-669
2. Nor is the latter repealed by act of 1879, specifying powers of county boards. *Id*.

**Stay.** See LAND CONTRACTS, 4. SUBROGATION.

**Stipulations.** See ATTORNEYS, 1.

Orders entered by, are not available as ground of error or reviewable in supreme court. *Omaha Fire Ins. Co. v. Maxwell*.....360, 361

**Streets.** See MUNICIPAL CORPORATIONS, 2.

**Strict Foreclosure.** See LAND CONTRACTS, 3, 4.

**Subrogation.** See ATTORNEYS.

A stay surety, who is also surety with the judgment debtor on a note for money with which the stayed judgment has been discharged, is not thereby subrogated to the rights of the judgment creditor. *Lichty v. Moore*.....269, 275

**Subscription.** See PARTIES.

**Summons.** See ACTIONS, 2, 7, 8. JUSTICE OF THE PEACE, 2.

**Sunday.** See ARBITRATION AND AWARD, 4.

**Supervisors.** See COUNTY TREASURER, 2-5.

**Supreme Court.** See DISMISSAL, 1, 2. REVIEW.

**Suretyship.** See JUDGMENTS, 3. NEGOTIABLE INSTRUMENTS, 4. SUBROGATION.

Sureties on a bond for the faithful performance of a building contract, which requires the payment of laborers and material-men, are not released from liability to the latter by an extension of time granted the principal by the obligee. *Lyman v. City of Lincoln*.....799, 800

**Surface Water.**

*Morrissey v. Chicago, B. & Q. R. Co.*.....415-421

**Survey.** See BOUNDARIES.

**Tacking Possession.**

*Maxwell v. Higgins*..... 679

**Taxation.** See MUNICIPAL CORPORATIONS, 3.

1. Improvements on government land, whose owners have not made final, are subject to. *State v. Tucker*..... 59

2. So are the interests, as determined by improvements, of lessees of school land and purchasers thereof who have not made full payment. *Id.*..... 60

3. A payment of taxes upon a demand known to be illegal, and without urgent necessity, such as threatened sale or seizure, is voluntary and cannot be recovered back. *Dixon County v. Beardshear*.....391, 392

4. Land in which federal government has such a beneficial

**Taxation—concluded.**

interest as to warrant withholding a patent, is not taxable by the state. *Graff v. Ackerman*.....722, 723

5. Petition to enjoin collection of tax must allege facts, not conclusions, which clearly entitle plaintiff to relief; petition under consideration *held* insufficient. *Spargur v. Romine*.....737-744

**Tax Liens.**

Not merely the right to foreclose, but also the lien itself expires in five years, and it cannot then be set up against the valid claims of a subsequent tax lien holder. *Alexander v. Shaffer*.....814-816

**Tender.** See LAND CONTRACTS, 2.

**Tenancies in Common.** See JOINT TENANCIES.

**Trade.** See GOOD-WILL.

**Transcript.** See APPEAL, 2. REVIEW, 8, 12.

**Trespass.** See NEGLIGENCE, 4, 8.

**Trial.** See CRIMINAL LAW, 12. CROSS-EXAMINATION. EVIDENCE. INSTRUCTIONS. NEW TRIAL. PRACTICE. REVIEW.

1. Where defenses are not sustained by the evidence, court should not direct verdict for defendants. *Lichty v. Moore*, 269
2. Upon a motion to direct a verdict for defendant, every allegation, in support of which there is testimony, should be considered as proved. *Union Stock Yards Co. v. Conoyer*.....488, 491  
*Habig v. Layne*..... 743
3. Admission of evidence, in itself immaterial, upon promise to connect it with material matters, is not erroneous if objections are waived. *Farwell v. Cramer* ..... 64
4. Oral motion, not shown to have been sustained, to send certain documentary evidence into the jury room, is not misconduct. *Id.*.....64, 65

**Trover.** See CONVERSION.

**Trusts.** See ATTORNEYS, 2.

**Undisclosed Principal.** See AGENCY, 1.

**Use and Occupation.** See HUSBAND AND WIFE, 3. LANDLORD AND TENANT, 3.

**Vacancy.** See INSURANCE, 2, 3.

**Vendor and Vendee.** See LAND CONTRACTS. MECHANICS' LIENS, 4. RESCISSION.

Continued possession of vendor after conveyance, which he claims to be fraudulent, is notice of his rights to purchasers from vendee. *Kahre v. Rundle*.....319, 320

**Vendor's Lien.** See MECHANICS' LIENS, 4.

**Venue.** See ACTIONS, 1-7, 7, 8.

**Vice-Principal.** See MASTER AND SERVANT, 3.

**Vicious Animals.**

*Hammond v. Johnson*..... 244

**Voluntary Payment.** See TAXATION, 3.

Payment by judgment debtor, of a judgment by virtue of which debtor's land has already been sold, with his knowledge, is voluntary, and gives no right of subrogation against plaintiff's attorney who retains the proceeds of the sale, and no rights in the land. *Washburn v. Osgood*...810, 811

**Waiver.** See CRIMINAL LAW, 5. DISMISSAL, 2. MECHANICS' LIENS, 6.

**Warrant.**

For arrest by justice of the peace, set out and held valid though informal. *Vennum v. Huston*.....301, 302

**Waters.**

1. Water-courses defined. *Morrissey v. Chicago, B. & Q. R. Co.*, 406, 420
2. Surface water distinguished from water-courses. *Id*...415-421
3. A railroad company is not liable for the deflection of surface water from its normal course by the construction of an embankment proper for railroad purposes. *Id*.....430, 431
4. In the absence of proof to the contrary such embankment will be presumed to have been properly constructed. *Id*, 414, 415
5. Information for unlawfully obstructing a stream by maintaining a mill-dam; sufficiency. *State v. Kendall*.....818-820

**Wills.** See ADMINISTRATION OF ESTATES, 6.

**Witnesses.** See COUNTY TREASURER, 3. CROSS-EXAMINATION. EVIDENCE, 9. HUSBAND AND WIFE, 3. LIQUORS, 9.

**Words and Phrases.** See MAXIMS.

1. "Abuse." *Palin v. State*..... 867
2. "Newspaper." *Rosewater v. Pinzenscham*..... 844
3. "Provable claims." *Stevenson v. Valentine*..... 903
4. "Ravish." *Palin v. State*..... 867

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